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Volume 11 1978 Number 2

Articles

The Teacher Privilege to Use Corporal Punishment
Kenneth M. Stroud 349

Criminal Discovery in Indiana: Its Past and Future
David R. Joest 373

Comment

Some Observations Regarding Crime Control
Andrew Jacobs, Sr. 403

Notes

Judicial and Administrative Treatment of Accountants' Qualifications and Disclaimers 431

The Pre-emption Doctrine and the Commodity Futures Trading Commission Act: In Favor of State Law 467

Recent Development

Torts—Judicial Immunity 489

Book Review

ACKERMAN: Private Property and the Constitution
James W. Torke 501

Volume 11 February 1978 Number 2

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The Teacher Privilege to Use Corporal Punishment

*Kenneth M. Stroud**

I. INTRODUCTION

Traditionally, teachers have had a qualified privilege to inflict corporal punishment on pupils under their control.[1] This privilege

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[1]The privilege has long been controversial, but the opponents have seldom been able to abolish the deeply rooted practice. Its antiquity is demonstrated in *Proverbs* 22:15 (King James): "Foolishness is bound in the heart of a child; but the rod of correction shall drive it far from him." In 1645, the Free Town School of Dorchester included in its governing rules the following:

> And because the Rodd of Correction is an ordinance of God necessary sometymes to bee dispenced unto Children . . . It is therefore ordered and agreed that the schoolmaster for the tyme beeing shall have full power to minister Correction to all or any of his schollers . . . and no parent . . . shall hinder or goe about to hinder the master therein [sic].

Dorchester Town Records, Jan. 14, 1645, *in* The Fourth Report of the Record Commissioners of the City of Boston 56 (1883), *cited in* Note, *The Birch Rod, Due Process, and the Disciplinarian*, 26 ARK. L. REV. 365, 375 n.47 (1972).

The opponent's case has seldom been put better than in Cooper v. McJunkin, 4 Ind. 290 (1853):

> The law still tolerates corporal punishment in the schoolroom. The authorities are all that way, and the legislature has not thought proper to interfere. The public seem to cling to a despotism in the government of schools which has been discarded everywhere else. . . .
>
> In one respect the tendency of the rod is so evidently evil, that it might, perhaps, be arrested on the ground of public policy. The practice has an inherent proneness to abuse. The very act of whipping engenders passion, and very generally leads to excess. . . . Hence the spirit of the law is, and the leaning of the courts should be, to discountenance a practice which tends to excite human passions to heated and excessive action, ending in abuse and breaches of the peace. Such a system of petty tyranny cannot be watched too cautiously nor guarded too strictly. . . .
>
> Were it within the province of these discussions, how many other objections to the rod, based upon its injurious moral influence on both teacher and pupil, might be safely assumed.
>
> One thing seems obvious. The very act of resorting to the rod demonstrates the incapacity of the teacher for one of the most important parts of

operates as a defense to both criminal and civil charges of battery brought against a teacher for such punishment. Although there has been only one opinion published in Indiana on the subject in the last eighty years,[2] two recent events have given a new urgency to the question of the exact scope of the defense. The first is the adoption of the new Indiana Criminal Code,[3] which defines certain defenses but omits any explicit reference to a corporal punishment defense, leaving it unclear whether the defense still exists and if so, what its scope is.[4] The second is the recent holding of the United States Supreme Court in *Ingraham v. Wright*.[5] In *Wright*, the Court held the eighth amendment's cruel and unusual punishment clause inapplicable to pupil corporal punishment cases[6] and further held that the fourteenth amendment's due process guarantee did not require notice or a hearing prior to the punishment.[7] The significance of this case in this context is that the Court reached its holding in large part because of the existence of "adequate" state remedies for pupils who are the victims of unjustified corporal punishment. Because the adequacy of the remedy is dependent upon the scope of the defense available to the teacher, the scope of the defense takes on new significance.

II. The Teacher's Privilege in Indiana

The intentional striking of another person without his consent for the purpose of punishing him clearly renders the actor liable to criminal and civil remedies for battery unless the action was privileged.[8] The reason for any such privilege is that a greater

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his vocation, namely, school government. For such a teacher the nurseries of the republic are not the proper element. They are above him. His true position will readily suggest itself.

It can hardly be doubted but that public opinion will, in time, strike the ferule from the hands of the teacher, leaving him as the true basis of government, only the resources of his intellect and heart.

Id. at 291-92.

Only two states prohibit corporal punishment by statute: Mass. Gen. Laws Ann. ch. 71, § 37 G (West Supp. 1977-1978); N.J. Stat. Ann. § 18A:6-1 (West 1968).

[2]Indiana State Personnel Bd. v. Jackson, 244 Ind. 321, 192 N.E.2d 740 (1963).

[3]Pub. L. No. 340, 1977 Ind. Acts 1533 (codified in scattered sections of title 35 of Ind. Code (Supp. 1977)).

[4]*See* pp. 363-64 *infra*.

[5]430 U.S. 651 (1977).

[6]*Id.* at 671. *See* notes 78-90 *infra* and accompanying text.

[7]430 U.S. at 682. *See* notes 91-97 *infra* and accompanying text.

[8]Ind. Code § 35-42-2-1 (Supp. 1977) defines a battery as: "A person who knowingly or intentionally touches another in a rude, insolent, or angry manner commits battery . . . ." Under prior law the provision read: "Whoever in a rude, insolent or angry manner, unlawfully touches another commits battery . . . ." *Id.* § 35-1-54-4 (1976) (repealed 1977).

public good is achieved by permitting the commission of what otherwise would be a tortious or criminal act when the elements of the privilege are established. The battery remedy furthers the public good by protecting persons against unwanted intrusions on their personal security. The policy of the teacher's privilege is to permit such intrusions by a teacher that are reasonably necessary for the proper education and discipline of the student. In creating this privilege, the lawmaker balances competing policies: To further the policy of the privilege is to diminish the policy of the remedy, and vice-versa. These policies are given legal significance by the substantive scope of the privilege; and the remedy, and therefore the scope of the remedy, varies inversely with the scope of the privilege. This implies that the lawmaker creating a privilege must clearly specify its substantive scope because only then can he control the degree to which the policy behind it will prevail over the policy of the remedy.

The substantive scope of the privilege is defined by its specific elements and the effect given to a teacher's mistaken belief in the existence of those elements. It is difficult to determine the scope of the pre-Code privilege in Indiana because of the paucity of statutory and case law on the subject. There are only seven cases in Indiana involving corporal punishment by a teacher.[9] Five of those were criminal battery prosecutions, the last one having occurred in 1894; one was a civil battery action in 1853; and one in 1963 involved corporal punishment as a ground for firing a state employee. Prior to 1973, there was no statute authorizing or regulating corporal punishment by teachers. In that year, a statute[10] was enacted to regulate the suspension and expulsion of students. It has some bearing on corporal punishment but is far from a comprehensive treatment; there are no cases construing the statute as applicable to corporal punishment cases. In spite of this, this author believes the substantive scope of the privilege can be delineated sharply enough to answer the two questions concerning the impact of the new Code and the *Wright* decision.

A civil battery has a similar definition. *See* Mercer v. Corbin, 117 Ind. 450, 20 N.E. 132 (1889); Cohen v. Peoples, 140 Ind. App. 353, 220 N.E.2d 665 (1966); Fort Wayne & N. Ind. Traction Co. v. Ridenour, 71 Ind. App. 263, 123 N.E. 720 (1919). *See* note 9 *infra* for the teacher-privilege cases.

[9]Indiana State Personnel Bd. v. Jackson, 244 Ind. 321, 192 N.E.2d 740 (1963); State v. Vanderbilt, 116 Ind. 11, 18 N.E. 266 (1888); Vanvactor v. State, 113 Ind. 276, 15 N.E. 341 (1888); Danenhoffer v. State, 69 Ind. 295 (1879); Cooper v. McJunkin, 4 Ind. 290 (1853); Gardner v. State, 4 Ind. 632 (1853); Marlsbary v. State, 10 Ind. App. 21, 37 N.E. 558 (1894).

[10]IND. CODE §§ 20-8.1-5-1 to -16 (1976).

A. Elements of the Privilege

This privilege can be analyzed in terms of the following elements: (1) The teacher must have the general authority to inflict corporal punishment on the pupil; (2) the rule violated must be within the scope of the educational function; (3) the violator of the rule must be the one punished; and (4) the punishment inflicted must be in proportion to the gravity of the offense.

1. The teacher[11] *must have the general authority to inflict corporal punishment on the pupil in appropriate cases.*—At a minimum, this excludes the possibility of relying on the privilege in a state that prohibits any type of corporal punishment. All of the Indiana cases involving corporal punishment have derived the teacher's authority from the doctrine of in loco parentis.[12] Simply stated, in loco parentis implies that the authority of a parent over a child is transferred to the teacher during the school day. Because a parent has the right to administer corporal punishment to his child, the teacher has the right by virtue of the doctrine of in loco parentis. The Indiana Supreme Court voiced this view in 1963:

> The law of Indiana clearly accords to the public school teacher in proper cases the same right over a child in his or her school as is possessed by the parent, and this includes the right to administer corporal punishment when it is appropriate. The law is well settled in this state that the teacher stands in loco parentis to the child, and his authority in this respect is no more subject to question than is the

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[11]The Indiana discipline statute makes it clear that the privilege is not confined to teachers but may be invoked by "any of the other school personnel" in charge of an educational function. IND. CODE § 20-8.1-5-2(a) (1976). *Id.* § 20-8.1-5-2(b) states:

> Each principal within the school or school function under his jurisdiction, the superintendent and the administrative staff with his approval, with respect to all schools, may make written rules and establish written standards governing student conduct, and take any action which is reasonably necessary to carry out, or to prevent interference with carrying out, any educational function.

Often the principal, not the teacher, inflicts the corporal punishment. *See, e.g.*, Ingraham v. Wright, 430 U.S. 651 (1977); Indiana State Personnel Bd. v. Jackson, 244 Ind. 321, 192 N.E.2d 740 (1963); Danenhoffer v. State, 69 Ind. 295 (1879).

[12]*Ballentine's Law Dictionary* defines in loco parentis as follows: "One who has taken a position in reference to a child of that of a lawful father, assuming the office of a father and the obligation of supporting the child, assuming a parental character and discharging parental duties, although not the parent." BALLENTINE'S LAW DICTIONARY 943 (3d ed. 1969).

"An individual is said to stand in loco parentis when he assumes the legal obligations of parenthood without going through the legal formalities of adoption." Sturrup v. Mahan, 261 Ind. 463, 470 n.3, 305 N.E.2d 877, 882 n.3 (1974).

> authority of the parent. The teacher's authority and the kind and quantum of punishment employed to meet a given offense is measured by the same rules, standards and requirements as fixed and established for parents.[13]

This dictum is an overly broad statement of the teacher's authority under the doctrine of in loco parentis. It has been recognized since Blackstone[14] that the teacher's authority to use corporal punishment is more limited than that of the parent, and the Indiana Supreme Court recognized this in *Vanvactor v. State*:[15]

> The books commonly assume that a teacher has the same right to chastise his pupil that a parent has to thus punish his child. But that is only true in a limited sense. The teacher has no general right of chastisement for all offenses as has the parent. The teacher's right in that respect is restricted to the limits of his jurisdiction and responsibility as a teacher.[16]

This doctrine is appropriate for cases where an actual delegation of authority from the parent can be found—for example, in the case of students in private schools or those over the age of compulsory attendance. However, where parents cannot withdraw their children from school or prevent their being subject to corporal punishment, the doctrine of in loco parentis is a fiction, and it is sounder to recognize that such public school pupils are subject to corporal punishment under the police power of the states that is delegated to the school officials.[17]

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[13]Indiana State Personnel Bd. v. Jackson, 244 Ind. 321, 328, 192 N.E.2d 740, 743-44 (1963).

[14]1 W. BLACKSTONE, COMMENTARIES 452-53 (1872).

> [A parent] may also delegate part of his parental authority, during his life, to the tutor or schoolmaster of his child; who is then in loco parentis, and has such a portion of the power of the parent committed to his charge, viz. that of restraint and correction, as may be necessary to answer the purposes for which he is employed.

Id. at 454.

[15]113 Ind. 276, 15 N.E. 341 (1887).

[16]*Id.* at 279-80, 15 N.E. at 342.

[17]1 F. HARPER & F. JAMES, LAW OF TORTS § 3.20, at 291 (1956); W. PROSSER, LAW OF TORTS § 27, at 136 (4th ed. 1971).

"Although the early cases viewed the authority of the teacher as deriving from the parents, the concept of parental delegation has been replaced by the view—more consonant with compulsory education laws—that the State itself may impose such corporal punishment as is reasonably necessary . . . ." Ingraham v. Wright, 430 U.S. at 662.

For a more detailed discussion of this issue, *see* Goldstein, *The Scope and Sources of School Board Authority to Regulate Student Conduct and Status: A Nonconstitutional Analysis*, 117 U. PA. L. REV. 373 (1969); Hudgins, *The Discipline of Secondary*

Since 1973, the teacher's authority to inflict corporal punishment could plausibly be based upon the following Indiana statute:

> Delegation of Authority. In carrying out the school purposes of the school corporation the following grants of authority are hereby made:
>
> (a) Each teacher and any of the other school personnel shall, when pupils are under his charge, have the right to take any action which is then reasonably necessary to carry out, or to prevent an interference with, the educational function of which he is then in charge.[18]

Although corporal punishment is not explicitly mentioned and there are no cases so construing the statute, the authorization of "any action" reasonably necessary to further the educational function would seem ample ground for implying the authority to use corporal punishment. Clearly the existence of the authority depends on the inflicter being one of the school personnel in charge of an educational function and the victim being a student involved in that function.

2. The rule violated by the student must further the "educational function"—for example, it cannot be a rule designed by the educator to carry out some private personal end.—What is an "educational function"? Although not defined in the statute, it is generally thought to include instruction per se *and* those housekeeping activities whereby the school acts as a host to the students—for example, in providing a safe environment for the students for eating, for recreation, and for transportation to and from school.[19] The *Restatement (Second) of Torts* provides: "One other than a parent who has been given by law . . . the function of controlling, training, or educating a child, is privileged to apply such reasonable force . . . as he believes to be necessary for its proper control, training, or education . . . ."[20] There would be no sound reason for Indiana to allow the use of corporal punishment for a breach of discipline occurring during classroom instruction and not during lunch or on the school bus going to and from school.

The Indiana cases have established this second element by requiring that the rule or order enforced be "reasonable,"—that is,

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School Students and Procedural Due Process: A Standard, 7 WAKE FOREST L. REV. 32 (1970); Sumption, *The Control of Pupil Conduct By the School*, 20 LAW AND CONTEMP. PROB. 80 (1955); Taylor, *With Temperate Rod: Maintaining Academic Order in Secondary Schools*, 58 KY. L.J. 617 (1970); Tripp, *Acting "In Loco Parentis" as a Defense to Assault and Battery*, 16 CLEV.-MAR. L. REV. 39 (1967); Note, *The Birch Rod, Due Process, and the Disciplinarian*, 26 ARK. L. REV. 365 (1972).

[18]IND. CODE § 20-8.1-5-2(a) (1976).

[19]1 F. HARPER & F. JAMES, *supra* note 17, § 3.20; Goldstein, *supra* note 17, at 387.

[20]RESTATEMENT (SECOND) OF TORTS § 147(2) (1965).

reasonably related to the educational function.[21] In *State v. Vanderbilt*,[22] the Indiana Supreme Court held that a school rule requiring students to pay for school property carelessly destroyed was invalid, stating: "The rule or rules to which the teacher may thus enforce obedience must, however, be reasonable, and whether or not such rules are reasonable is ultimately a question for the courts."[23] The court said this rule was not reasonable because the students would have to look to the parents for money, and if it was not forthcoming, "the child would be left subject to punishment for not having done what it had no power to do."[24] In addition, the rule was not reasonable because it made punishable merely careless acts by the student.

In *Danenhoffer v. State*,[25] the Indiana Supreme Court reversed a battery conviction where the defendant, the superintendent of the school, whipped an eleven-year-old boy who disobeyed the order of the teacher to take a note to the defendant and went home instead. The court said a "teacher has the right to exact from his pupils obedience to his lawful and reasonable commands,"[26] and that this order was a reasonable command. In *Vanvactor v. State*,[27] the teacher switched the student for disrupting the class with humorous antics while the teacher's back was turned. The court reversed the battery conviction, stating that a teacher may exact compliance with all reasonable commands:

> Patrick's offense as a breach of good deportment in a school was not one to be overlooked or treated lightly. It was calculated, and was most likely intended, to humiliate Vanvactor, in the presence of his pupils, and its tendency was to impair his influence in the government of his school.[28]

In *Indiana State Personnel Board v. Jackson*,[29] the court held the whipping of a student for disrupting a class by using abusive language and throwing her books on the floor to be within the privilege.

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[21]The concept of "reasonableness" also implies that there is room for difference of judgment on whether any given rule or order does further an educational function and whether the teacher's mistaken determination will be accepted, if reasonable. *See* pp. 360-63 *infra*.

[22]116 Ind. 11, 18 N.E. 266 (1888).

[23]*Id.* at 13-14, 18 N.E. at 267.

[24]*Id.* at 14, 18 N.E. at 267-68.

[25]69 Ind. 295 (1879).

[26]*Id.* at 299.

[27]113 Ind. 276, 15 N.E. 341 (1888).

[28]*Id.* at 281, 15 N.E. at 343.

[29]244 Ind. 321, 192 N.E.2d 740 (1963). *See* note 54 *infra* and accompanying text.

The rule or order must be reasonable as applied in addition to being reasonable in general. In *Fertich v. Michener*,[30] the Indiana Supreme Court held that a general rule requiring tardy students to wait in a vestibule until the opening exercises had been completed was reasonable. However, it could not reasonably be applied when the temperature outside was eighteen degrees below zero and the vestibule was too cold to wait in comfortably.[31] The rule or order cannot make punishable any behavior that is constitutionally protected, nor can it discriminate against any student.[32]

An Indiana statute also provides for the dissemination of rules and standards:

> No rule or standard shall be effective with respect to any student until a written copy thereof is made available or delivered to the student or his parent, or is otherwise given general publicity within any school to which it applies. This limitation shall not be construed technically and shall be satisfied in any case where there has been a good faith effort to disseminate to students or parents generally the text or substance of any rule or standard.[33]

Some rules are capable of being set out in writing, and it is no undue burden to require publication to the pupil before a violation can be punished. However, some orders are not capable of being specified in writing in advance because a wide variety of pupil conduct is punishable, and it would be impossible to anticipate it in detail. This

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[30]111 Ind. 472, 11 N.E. 605 (1887). This is not a corporal punishment case. The pupil sued the teacher for false imprisonment for keeping the student after class for violating a rule, and for injuries sustained when the pupil returned home in eighteen degree below zero weather rather than wait in an unheated vestibule as required by the teacher's rule.

[31]*Id.* at 480, 11 N.E. at 609.

[32]IND. CODE § 20-8.1-5-3 (1976) provides:

> The delegations of authority provided in . . . this chapter shall, however, be subject to the following limitations: (a) Delegation of authority shall be necessary in carrying out school purposes and shall comply with the applicable statutes of the state of Indiana and with the Constitutions of Indiana and of the United States. Rules, standards or actions shall not discriminate against any student or class of students, but the number of schools or students to which they apply shall not be determinative of whether they thus discriminate. Rules, standards or actions which interfere with a constitutionally protected fundamental student right shall be valid only in instances where they are necessary to prevent an interference with the educational function of the school. All rules, standards or actions shall be reasonably necessary in carrying out school purposes, and all rules, standards or actions shall be narrowly constructed in order to accomplish their purpose with the minimal infringement on constitutionally protected rights.

[33]IND. CODE § 20-8.1-5-3(c) (1976).

is recognized in *Danenhoffer*[34] where the court cited with approval a Wisconsin case in which the pupil's obligation to obey lawful commands of the teacher was held to constitute the common law of the school and "every pupil is presumed to know this law and is subject to it, whether it has or has not been re-enacted by the district board in the form of written rules and regulations."[35] The Indiana statute on pupil discipline is in accord and provides that the requirement shall *not* apply to

> rules or directions concerning the movement of students, movement or parking of vehicles, day to day instructions concerning the operation of a classroom or teaching station, the time or times for commencement of school, or other standards or regulations relating to the manner in which an educational function is to be carried out.[36]

3. The actual violator of the rule must be the one punished.— This seems obvious, and none of the Indiana cases discuss this issue.[37]

4. The corporal punishment inflicted must be proportioned to the gravity of the offense.—Corporal punishment is *punishment*[38] for the purpose of furthering the educational function of the school by rehabilitating the violator, deterring the pupil and other pupils from further violations, and vindicating the rule infringed. Therefore, the type and extent of the corporal punishment actually in-

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[34]Note, however, that *Danenhoffer* was decided long before the relevant statute and therefore is not an explicit interpretation of the statute.

[35]69 Ind. at 299 (quoting State *ex rel.* Burpee v. Burton, 45 Wis. 150, 155 (1878)). *See also* Salem Community School Corp. v. Easterly, 150 Ind. App. 11, 275 N.E.2d 317 (1971).

[36]IND. CODE § 20-8.1-5-3(c) (1976).

[37]The dissenters in Ingraham v. Wright, 430 U.S. 651, 681 (1977), argued this element could present a problem to the Court's due process holding. *See* discussion at pp. 368-71 *infra.*

[38]In *Wright*, the Court stated:

> No one can deny that spanking of school children is "punishment" under any reasonable reading of the word, for the similarities between spanking in public schools and other forms of punishment are too obvious to ignore. Like other forms of punishment, spanking of school children involves an institutionalized response to the violation of some official rule or regulation proscribing certain conduct and is imposed for the purpose of rehabilitating the offender, deterring the offender and others like him from committing the violation in the future, and inflicting some measure of social retribution for the harm that has been done.

Ingraham v. Wright, 430 U.S. 651, 685-86 (1977) (White, J., dissenting). The majority in *Wright* agreed that spanking school children is "punishment" but argued that not all punishments are subject to the cruel and unusual punishments clause of the United States Constitution. *Id.* at 670 n.39 (citing U.S. CONST. amend. VIII).

flicted must further those purposes. Any corporal punishment other than that needed to accomplish these goals is excessive or unreasonable.[39] Excessiveness is determined by the varying circumstances in each particular case; and the factors considered are the nature of the offense, the age, sex, physical and mental condition of the student, the instrument used, the part of the student's body involved, and the severity of the force.[40]

The oldest Indiana case involving this issue is *Cooper v. McJunkin*,[41] a civil battery action by a pupil against his teacher. The second count of the complaint alleged the teacher "unlawfully, and with inhuman violence, beat, bruised, cut and gashed the face and head" of the pupil.[42] The teacher pleaded that the good government of the school required him to moderately chastise the pupil for misconduct, as the teacher had the legal right to do so. The Indiana Supreme Court reversed a judgment for the teacher, stating that even if the teacher's plea was adequate for the first count of simple battery it was not sufficient in regard to the second count. If the teacher committed the acts alleged in the second count, this could not be justified as the lawful infliction of "moderate chastisement."[43]

In *Gardner v. State*,[44] a teacher was alleged to have worn out two whips on the student and to have administered a "blow or two with his fist on the head, and a couple of kicks in the face"[45] because of the pupil's refusal to continue trying to spell the word "commerce." Although the court reversed the conviction on other grounds, it held that such actions would not fall within the privilege.[46]

Cases involving excessive force by parents on their children are relevant here because the Indiana Supreme Court has stated that although the teacher does not have precisely the same right of corporal punishment as the parent in all respects, he does have the same right as far as the quantum of force permitted.[47] In *Hinkle v. State*,[48] the court affirmed a battery conviction of a father who had chained his twelve-year-old daughter to a sewing machine while the father was away at work all day because she was incorrigible and

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[39]*See* note 18 *supra*.

[40]Vanvactor v. State, 113 Ind. 276, 15 N.E. 341 (1888); Cooper v. McJunkin, 4 Ind. 290 (1853).

[41]4 Ind. 290 (1853).

[42]*Id.* at 291.

[43]*Id.* at 293.

[44]4 Ind. 632 (1853).

[45]*Id.* at 633.

[46]*Id.*

[47]*See* Indiana State Personnel Bd. v. Jackson, 244 Ind. 321, 192 N.E.2d 740 (1963); Vanvactor v. State, 113 Ind. 276, 15 N.E. 341 (1888).

[48]127 Ind. 490, 26 N.E. 777 (1891).

would not obey him. The court held that this chastisement was unreasonable and not within the privilege of a parent to use corporal punishment on his child.[49] In *Hornbeck v. State*,[50] the court affirmed a conviction for battery by the father for striking his thirteen-year-old son several times with a buggy whip, saying:

> The law is well settled that a parent has the right to administer proper and reasonable chastisement to his child without being guilty of an assault and battery; but he has no right to administer unreasonable or cruel and inhuman punishment. If the punishment is excessive, unreasonable, or cruel it is unlawful.[51]

The corporal punishment is not excessive merely because it causes pain to the student. In *Vanvactor v. State*,[52] the teacher struck a sixteen-year-old student nine sharp blows on the back part of his legs between his body and the knee joints with a green switch three feet long and forked near the middle with two prongs composed of twigs. The student made no outcry, the switch was not broken, and he was back in school the next day without complaint. The evidence showed the switching had left imprinted marks and abrasions on his legs, which for a time gave him pain and annoyance. The court reversed the teacher's battery conviction because there was insufficient evidence that the force used was excessive:

> The legitimate object of chastisement is to inflict punishment by the pain which it causes as well as the degradation which it implies. It does not, therefore, necessarily follow, because pain was produced, or some abrasion of the skin resulted from a switch, that a chastisement was either cruel or excessive.[53]

The only other case where punishment not found to be excessive was described within the opinion was *Indiana State Personnel Board v. Jackson*.[54] The plaintiff was a supervisor at the Muscatatuck State School under the direction of the Department of Mental Health. He was dismissed from his job for striking a fourteen-year-old female student several times across the buttocks with a belt for disrupting a class with abusive language to the teacher and the plaintiff. In ordering the plaintiff reinstated, the court noted the evidence showed

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[49] *Id.* at 491, 26 N.E. at 778.
[50] 16 Ind. App. 484, 45 N.E. 620 (1896).
[51] *Id.* at 485, 45 N.E. at 620.
[52] 113 Ind. 276, 15 N.E. 341 (1888).
[53] *Id.* at 281, 15 N.E. at 343.
[54] 244 Ind. 321, 192 N.E.2d 740 (1963)

that the plaintiff had resorted to the belt only after persuasion and other means had failed, that the plaintiff had struck the student lightly and without anger, and that the striking had not harmed the girl but rather had enabled her to gain control of herself. Therefore, this amount of force was within the privilege.

B. Teacher's Mistaken Belief in the Elements

The teacher must often make the determination that the above four elements are present by relying only on ambiguous facts that arise in an emotionally charged atmosphere; hence, the teacher could make a mistaken determination on any of the four elements. Under what circumstances can a mistaken teacher retain the benefit of the privilege? There are three basic approaches that could be taken in answering this question. Each reflects a different policy choice as to the substantive scope of the privilege.

Model #1: "The Teacher Must Be Correct."—In the context of the administration of the privilege, this means that his conclusion as to the existence of the elements must coincide with the determination of the jury. For example, if the jury finds the victim was not the actual violator or the force used was excessive, then the teacher was mistaken in concluding differently no matter how reasonable the conclusion may have been. This rule would constitute the strongest deterrent to corporal punishment. The teacher would be uncertain as to when an unknown trier of fact with calm, detached hindsight would second-guess the teacher and impose its determination upon him, without deference to the teacher's superior position to evaluate the facts and to the necessity to act under pressure. This model gives the narrowest substantive scope to the privilege and enlarges that of the battery remedy.

Model #2: "The Teacher Must Be Reasonable."—Here the teacher need not be correct in concluding the four elements were present, but his conclusion must have been one a reasonable man could have made under the circumstances. This would be less of a deterrent to corporal punishment because a wider range of teacher decisions would fall within the privilege. He retains the privilege for mistakes that ordinary people would make but not for negligent choices, even if such choices were honest and due to abnormal perceptions or temperament.

Model #3: "The Teacher Need Only Act in Good Faith."—"Good faith" in this context means an honest, subjectively held belief in the presence of the element and thus is the equivalent of "without malice." The teacher would act *with* malice if he knew of the nonexistence of the element or had a reckless indifference to its existence. A negligent determination by the teacher would *not* cost

him the benefit of the privilege. This approach offers the least deterrent to the use of corporal punishment because a very wide range of teacher decisions—except malicious ones—fall within the privilege. This model gives the widest substantive scope to the privilege.

In the abstract, any of these models could be applied to all four elements, or one model could be used for some of the elements and a different model for the others. The choice is dictated by the accommodation sought between the competing policies behind the remedy and the privilege.[55] There are no Indiana cases discussing the problem of the teacher's mistaken belief in the first or third elements. Although Indiana could take an approach to those two elements different from that taken to the others, there is no apparent reason to believe it would. The Indiana cases adopt the "reasonableness" approach of *Model #2* with respect to the second and fourth elements. The court signals this by requiring that the rule or amount of force used be "reasonable."[56] This implies that there is room for differences of judgment over whether any given rule or order furthers an educational function or whether a given punishment is proportioned to the gravity of the offense. The teacher's decision, though mistaken, will be accepted as within the privilege. The same reasoning applies to the Indiana statute, which authorizes "any action *reasonably* necessary to carry out" the educational function.[57]

An apparent exception is *Fertich v. Michener*,[58] which involved, in part, an action for false imprisonment against the teacher for keeping a student after class as a penalty for violating a rule. The Indiana Supreme Court stated: "The recognized doctrine now is that a school officer is not personally liable for a mere mistake of judgment in the government of his school. To make him so liable it must be shown that he acted in the matter complained of wantonly, willfully and maliciously."[59] If the court meant that acting maliciously

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[55]In general, the older cases tended to adopt a malice requirement for the teacher's liability, but the modern majority rule is that "unreasonableness" is required. *See* Sumption, *supra* note 17; Tripp, *supra* note 17; Annot., 89 A.L.R.2d 396 (1963).

[56]*See* note 23 *supra* and accompanying text.

[57]IND. CODE § 20-8.5-5-2(a) (1976) (emphasis added). *See* note 18 *supra* and accompanying text.

[58]111 Ind. 472, 11 N.E. 605 (1887).

[59]*Id.* at 485, 11 N.E. at 611.

> However mistaken a teacher may be as to the justice or propriety of imposing such a penalty at any particular time, it has none of the elements of false imprisonment about it, unless imposed from wanton, willful, or malicious motives. In the absence of such motives, such a mistake amounts only to an error of judgment in an attempt to enforce discipline in the school, for which, as has been stated, an action will not lie.

Id.

was a *necessary* condition for liability, then a negligent mistake would still be within the privilege; and this would be incompatible with the reasonableness requirement. However, if the court meant only that a malicious mistake was a *sufficient* condition for losing the privilege, that would not be incompatible with saying a negligent mistake would *also* lose it. The court's use of the word "must" appears to indicate the former view was intended, but the court may have inadvertently used "must" because in the same opinion the court said: "A school regulation must therefore be not only reasonable in itself, but its enforcement must also be reasonable in the light of existing circumstances."[60] Again, in discussing the enforcement of a school rule, the court said it "was undoubtedly both an unreasonable and a negligent, and hence an improper, enforcement of the rule."[61] This would imply that a negligent enforcement of a rule would *not* be within the privilege, and malice is not necessary to lose the privilege. All of the corporal punishment cases after *Fertich* adopted the "reasonableness" rule and never required the showing of malice.[62] None of the Indiana cases cited by the *Fertich* court supported the "must" language found in that opinion.[63]

The issue of the teacher's malice can also arise in a completely separate way. What if the jury determines that the defendant knew the four objective elements *were present* but his subjective motive for punishing the student was anger or hatred? Is that state of mind relevant to establishing the defense? There are several Indiana cases which imply that the teacher's motive is relevant and that administering corporal punishment with ill will or malice will defeat the privilege.[64] In *Cooper v. McJunkin*,[65] the Indiana Supreme Court said:

> Teachers should, therefore, understand that whenever correction is administered in anger or insolence, or in any other manner than in moderation and kindness, accompanied with that affectionate moral suasion so eminently due from one placed by the law *"in loco parentis"—in the sacred relation*

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[60]*Id.* at 484, 11 N.E.2d at 610.

[61]*Id.* at 484, 11 N.E.2d at 611.

[62]*See* Indiana State Personnel Bd. v. Jackson, 244 Ind. 321, 192 N.E.2d 740 (1963); State v. Vanderbilt, 116 Ind. 11, 18 N.E. 266 (1888); Vanvactor v. State, 113 Ind. 276, 15 N.E. 341 (1888); Marlsbary v. State, 10 Ind. App. 21, 37 N.E. 558 (1894).

[63]*See* Danenhoffer v. State, 69 Ind. 295 (1879); Gardner v. State, 4 Ind. 632 (1853); Cooper v. McJunkin, 4 Ind. 290 (1853).

[64]Indiana State Personnel Bd. v. Jackson, 244 Ind. 321, 192 N.E.2d 740 (1963); Vanvactor v. State, 113 Ind. 276, 15 N.E. 341 (1888); Danenhoffer v. State, 69 Ind. 295 (1879); Cooper v. McJunkin, 4 Ind. 290 (1853).

[65]4 Ind. 290 (1853).

> *of parent*—the Courts must consider them guilty of assault and battery . . . .[66]

In *Indiana State Personnel Board v. Jackson*,[67] the court emphasized that the teacher administered the punishment in a "kindly manner and without anger."[68] This problem of malice is completely different from the problem of a malicious mistake by the educator, and it is not clear that the court has ever meant to imply that the teacher's motive is relevant even when the four objective elements were present. At least there is no case so holding when the facts of the case presented such an issue.

III. The Effect of the New Criminal Code

The new Indiana Criminal Code,[69] in addition to codifying the criminal offenses, defines certain of the traditional criminal defenses,[70] but it omits any explicit reference to the teacher's qualified privilege to inflict corporal punishment on students. However, section 35-41-3-1 of the Criminal Code does state: "A person is justified in engaging in conduct otherwise prohibited if he has legal authority to do so."[71] This could easily be construed as preserving intact all defenses in existence under prior law that were not explicitly defined in the new Criminal Code.[72] The "legal authority" for the conduct would be found in the cases that created the defenses. Under this construction of the above provision, the teacher's defense is *formally* codified, but its scope must be derived from case law. There are good reasons to construe the provision this way. The new Criminal Code contains no provision purporting to make it the exclusive source of all criminal defenses. Prior to the new Code, although criminal offenses could only be created by statute,[73] criminal defenses could be created by the courts.[74] There is nothing

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[66] *Id.* at 292 (emphasis in original).

[67] 244 Ind. 321, 192 N.E.2d 740 (1963).

[68] *Id.* at 329, 192 N.E.2d at 744.

[69] Pub. L. No. 340, 1977 Ind. Acts 1533 (codified in scattered sections of title 35 of the Ind. Code (Supp. 1977)).

[70] *E.g.*, intoxication, Ind. Code § 35-41-3-5 (Supp. 1977); insanity, *id.* § 35-41-3-6; duress, *id.* § 35-41-3-8; self-defense, *id.* § 35-41-3-2.

[71] *Id.* § 35-41-3-1.

[72] This provision could be construed even more broadly as sanctioning any defense created by the courts before *or* after the adoption of the Criminal Code. This broader construction is not required to preserve the educator's defense, because it was clearly in existence prior to the adoption of the new Criminal Code.

[73] Ind. Code § 1-1-2-2 (1976) (repealed 1977). "Crimes and misdemeanors shall be defined and punishment therefor fixed by statutes of this state and not otherwise." *Id.*

[74] Hill v. State, 252 Ind. 601, 251 N.E.2d 429 (1969) (insanity); Gardner v. State, 4 Ind. 632 (1853) (teacher's defense to battery prosecution).

in the new Code to change this distribution of law-making power, nor is there any policy reason to adopt a strained construction of what is at best a legislative ambiguity in order to abolish a traditional defense.

There are no Study Commission comments[75] or legislative histories to assist in settling this problem. The original proposed code[76] to which the comments were directed did not include the teacher's defense *or* the legal authority defense. This could be viewed as indicative of omission through inadvertence especially given the lack of any policy reason to abolish the defense. It is plausible to view the later insertion of the legal authority defense as attempting to remedy the omission of some defenses from the code.

If section 35-41-3-1 is construed to apply only to public employees whose authority is based on statute, regulation, or superior's orders,[77] then the teacher's privilege is still included because of the statute that authorizes teachers to take "any action which is then reasonably necessary to carry out . . . the educational function."[78] This statute uses virtually the same language used by the cases creating the defense, and it can easily be interpreted to have the same scope as the court-created defense.

Under either interpretation of the Criminal Code, the teacher's defense remains intact, and its exact scope is dictated by the pre-Code cases and statutes described above.

IV. THE FEDERAL CONSTRAINT—INGRAHAM V. WRIGHT

In *Ingraham v. Wright*,[79] the United States Supreme Court held the eighth amendment's cruel and unusual punishment clause inapplicable to pupil corporal punishment cases and held that the fourteenth amendment's due process guarantee did not require notice or a hearing prior to the punishment.

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[75]INDIANA CRIMINAL LAW STUDY COMMISSION, INDIANA PENAL CODE: PROPOSED FINAL DRAFT (1974). The proposed code was authored by the Indiana Criminal Law Study Commission, which was created by Executive Order of the Governor. The Commission's comments to each section of the proposed criminal code are the only printed source of information on the legislative history of the new Criminal Code.

[76]*Id.* (originally enacted as Pub. L. No. 148, 1976 Ind. Acts 718).

[77]This interpretation is suggested by a similar statute proposed for the Federal Criminal Code. THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, FINAL REPORT: A PROPOSED NEW FEDERAL CRIMINAL CODE § 602(1) (1971) provided: "Conduct engaged in by a public servant in the course of his official duties is justified when it is required or authorized by law."

[78]IND. CODE § 20-8.1-5-2(a) (1976).

[79]430 U.S. 651 (1977).

A. Cruel and Unusual Punishment

The plaintiffs, who were pupils in a Florida public school system, claimed that the educators[80] who inflicted corporal punishment on them had deprived them of their constitutional right to be free of "cruel and unusual punishments."[81] In rejecting this claim, the Supreme Court held that the original meaning of the clause and the Court's past decisions applying it had restricted the applicability of the clause to punishments related to criminal convictions.[82] The plaintiffs conceded that the original design of the clause was to limit criminal punishment but requested the court to extend its coverage to corporal punishment of students. The Court refused on the ground that "[t]he school child has little need for the protection of the Eighth Amendment."[83] This conclusion results from a combination of two factors: (1) The school is an open, community institution in which the child is neither isolated from friendly support nor physically restrained from leaving, and this affords "significant safeguards against the kinds of abuses from which the Eighth Amendment protects the prisoner";[84] and (2) the existence of state remedies adequate to deter such abuses.

> Public school teachers and administrators are privileged at common law to inflict only such corporal punishment as is reasonably necessary for the proper education and discipline of the child; any punishment going beyond the privilege may result in both civil and criminal liability. . . . As long as the schools are open to public scrutiny, there is no reason to believe that the common law constraints will not effectively remedy and deter excesses such as those alleged in this case.[85]

It is not clear whether a pupil, allegedly the victim of excessive corporal punishment, could state a claim under the eighth amendment in a case where the factual premises of the Court's rule are absent—for example, where the institution is not open[86] or where

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[80]Named as defendants were the principal, the assistant principal and the superintendent of the county school system. It is not clear from the Supreme Court's opinion who actually inflicted the punishment on the plaintiffs. The court of appeals opinion indicates it was the principal who actually spanked one of the plaintiffs.

[81]U.S. CONST. amend. VIII, provides: "Excessive bail shall not be required, nor excessive fines imposed, *nor cruel and unusual punishments inflicted.*" (Emphasis added.)

[82]430 U.S. at 669-70.

[83]*Id.* at 670.

[84]*Id.*

[85]*Id.*

[86]In Nelson v. Heyne, 491 F.2d 352 (7th Cir. 1974), the court held the eighth amendment applicable to corporal punishment in the Indiana Boys School, a school for

the state has no remedy adequate to effectively deter such abuses. If the inadequate scope of the state remedy could give rise to a claim for damages under the eighth amendment, then the scope of the remedy has taken on constitutional significance. Because the scope of the remedy is defined by the scope of the educator's privilege, the latter takes on a new constitutional significance, which can be litigated in a federal court.

The argument that such a claim is permissible under *Wright* is simply that when the reason for a court's ruling is nonexistent the ruling ceases to apply. It is not clear that the Supreme Court intended to hold that the applicability of the eighth amendment to school corporal punishment is open to relitigation merely by a student alleging that the state remedy against the teacher is inadequate. The tone of the Court's opinion seems contrary: "We conclude that when public school teachers or administrators impose disciplinary corporal punishment, the Eighth Amendment is inapplicable."[87] There are no qualifications or exceptions. In the course of the opinion, the Court carefully refrains from asserting that every state does, in fact, have an adequate remedy but uses phrases like: "[i]n virtually every community."[88] If the Court intended to leave open the possibility of an eighth amendment claim in a state without an adequate remedy, its holding would surely have been less general and conclusive.

If the Court does permit such claims under the eighth amendment, it would not be opening the federal judiciary to the litigation of numerous claims on the reasonableness of the punishment—something the majority was very anxious to avoid.[89] The sole issue

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juvenile delinquents. Another example of an unopen school would be one for the mentally retarded where the patient-students are committed to the institution.

[87]430 U.S. at 671.

[88]"In virtually every community where corporal punishment is permitted in the schools, these safeguards are reinforced by the legal constraints of the common law." *Id.* at 670. "To the extent that the force is excessive or unreasonable, the educator in *virtually all States* is subject to possible civil and criminal liability." *Id.* at 661 (emphasis added).

The Court lists 21 states having statutes authorizing corporal punishment, *id.* at 662 n.23; 2 with statutes prohibiting it, *id.* at 663 n.27; and 10 states where the courts had authorized it, *id.* at 662, n.28. This is a total of 33 states. It does not appear crucial to the Court that some states may not provide an adequate remedy to the student.

[89]The dissenting opinion warns that as a consequence of our decision today, teachers may "cut off a child's ear for being late to class." This rhetoric bears no relation to reality or to the issues presented in this case. The laws of virtually every State forbid the excessive physical punishment of school childien [sic]. Yet the logic of the dissent would make the judgment of which disciplinary punishments are reasonable and which are excessive a matter of constitutional principle in every case, to be decided ultimately by this Court. The hazards of such a broad reading of the Eighth Amendment are clear.

Id. at 671, n.39 (citing Justice White's dissent, *id.* at 684).

would be the proper scope of the educator's defense required to effectively deter abuse of the right to use corporal punishment. This is a matter of substantive law and could be settled in one case for all the states. This may violate the Court's sense of its proper role in shaping state remedies,[90] but it would foreclose an endless stream of fact-sensitive cases concerning the reasonableness of the actual corporal punishment inflicted in each instance.

What is the test for the "adequacy" of the state remedy and privilege? The state remedy must be capable of deterring the punishments that would be excessive under the eighth amendment were it applicable. If the state remedy does not deter that type of punishment, then there is still a need for the federal remedy rejected in *Wright*. The Court is assuming that the definition of excessive force used by a state privilege of "adequate scope" would identify the identical set of cases as would the definition of excessive force for eighth amendment purposes. What is the scope of the privilege that will accomplish this? All versions of the privilege will include the four objective elements, and any difference will lie in the effect given to the teacher's mistake. If the malice model is adopted, the scope of the privilege is greater than if the reasonableness model is used, and it offers less deterrent to the use of excessive force. Does this decrease in deterrence mean that it would not be "adequate" within the meaning of *Wright* and that the reasonableness model is required? This is not necessarily so, because the standard for excessiveness is established to serve the policy involved. The policy behind the eighth amendment is to prevent certain types and amounts of punishment because their infliction would violate current concepts of decency and humane treatment of those otherwise legitimately punished.[91] The policy behind

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[90]"It goes without saying that preventing and dealing with crime is much more the business of the States than it is of the Federal Government, and that we should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States." Patterson v. New York, 97 S.Ct. 2319, 2322 (1977) (citations omitted).

[91]These decisions recognize that the Cruel and Unusual Punishments Clause circumscribes the criminal process in three ways: first, it limits the kinds of punishment that can be imposed on those convicted of crimes . . . ; second, it proscribes punishment grossly disproportionate to the severity of the crime . . . ; and third, it imposes substantive limits on what can be made criminal and punished as such . . . ." The primary purpose of [the Cruel and Unusual Punishments Clause] has always been considered, and properly so, to be directed at the method or kind of punishment imposed for the violation of criminal statutes . . . .

Ingraham v. Wright, 430 U.S. at 667 (citing Powell v. Texas, 392 U.S. 514, 531-32 (1968)).

"[The prohibition] is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice." Gregg v. Georgia, 428 U.S.

the privilege is to allow only the punishment that is necessary for the proper education and discipline of the child.[92] There is no a priori reason why the two standards should always select the same quantum of punishment as excessive. This is true regardless of the scope of the privilege the state has adopted. In other words, the Court did not provide a criterion by which to determine whether any scope for the privilege will deter excessive force as defined for eighth amendment purposes. The Court simply assumed that the scope of the common law privilege of "reasonable necessity" is adequate to supplant the eighth amendment remedy. The Indiana privilege is essentially similar to that common law privilege and therefore should be considered satisfactory under this aspect of *Wright*.

B. Procedural Due Process

The plaintiffs in *Wright* also alleged a deprivation of their rights under the due process clause to notice and hearing prior to the punishment. The Court applied a two-step analysis that it uses for resolving procedural due process cases:[93] (1) Is the individual interest asserted within the due process clause protection of "life, liberty, or property"; and (2) if so, what procedures are required to satisfy the clause? The Court held that the child's interest in freedom from bodily restraint and punishment is within the protection of the fourteenth amendment:

> It is fundamental that the state cannot hold and physically punish an individual except in accordance with due process of law. This constitutionally protected liberty interest is at stake in this case. There is of course a deminimus level of imposition with which the constitution is not concerned. But at least where school authorities, acting under color of state law, deliberately decide to punish a child for misconduct by restraining the child and inflicting appreciable physical pain, we hold that Fourteenth Amendment liberty interests are implicated.[94]

153, 171 (1976) (citing Weems v. United States, 217 U.S. 349, 378 (1910)). "The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." Trop v. Dulles, 356 U.S. 86, 101 (1958).

In Jackson v. Bishop, 404 F.2d 571 (8th Cir. 1968), the eighth circuit held that the use of corporal punishment—in this case, the strap—on prisoners violated the evolving standards of decency implicit in the eighth amendment.

[92]Ingraham v. Wright, 430 U.S. at 662. For Indiana cases on this point, *see* note 5 *supra*.

[93]Ingraham v. Wright, 430 U.S. at 672 (citing Board of Regents v. Roth, 408 U.S. 564, 569-72 (1972); Morrissey v. Brewer, 408 U.S. 471, 481 (1972)).

[94]430 U.S. at 674.

The issue for the Court was whether the traditional common law remedies for unjustified corporal punishment are adequate to afford due process. This turns on an analysis of the competing interests at stake, and the Court identified four factors to be considered: (1) The private interest affected, in this case the liberty interest of the student; (2) the risk of an erroneous deprivation of such interest; (3) the probable value of additional procedural safeguards; and (4) the state interest involved.

The Court noted that reasonable corporal punishment in school is justifiable under the laws of most states, thus striking a balance between the student's interest in personal security and the view that some limited corporal punishment may be necessary for the education of the child: "Under that longstanding accommodation of interests, there can be no deprivation of substantive rights as long as disciplinary corporal punishment is within the limits of the common law privilege."[95] The Court recognized that there is always some risk that the deprivation of the student's liberty interest will be unjustified: "In these circumstances the child has a strong interest in procedural safeguards that minimize the risk of wrongful punishment and provide for the resolution of disputed questions of justification."[96] The Court then held that the existence of the Florida civil and criminal remedies against the teacher for an unjustified use of corporal punishment were adequate to afford due process to the student.[97]

Because the Court squarely bases its holding on the adequacy of Florida law to remedy any unjustified intrusions on the pupil's liberty interest, it would seem to follow that in any state without an adequate remedy the school officials are constitutionally required to provide the pupil with prior notice and hearing. The Court is in cautious agreement: "Were it not for the common law privilege permitting teachers to inflict reasonable corporal punishment on children in their care, and the availability of the traditional remedies for abuse, the case for requiring advance procedural safeguards would be strong indeed."[98] In these circumstances, the failure to provide notice and hearing would violate the pupil's fourteenth amendment rights and subject the educator to a federal suit for damages. Once again, the nonexistence of an "adequate" state

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[95] *Id.* at 676.

[96] *Id.*

[97] *Id.* at 682. In reaching its conclusion, the Court also held that the additional safeguard of a pre-punishment hearing would not add significantly to the protection of the student's interest. Even if that were not the case, the burden on the state would outweigh the benefit to the student. *Id.* at 678-82.

[98] *Id.* at 674.

remedy for unjustified corporal punishment is a crucial prerequisite for the existence of a pupil's federal constitutional right.

Under this part of *Wright*, the "adequacy" of the state remedy is tested by whether it removes the needs for the due process notice and hearing prior to the punishment. The purpose of the due process notice and hearing would be to provide a forum for the resolution of the disputed question of justification for the punishment and thereby minimize the risk of unjustified deprivation of a pupil's liberty interest. The state remedy must provide such a forum in order to supplant the pre-punishment procedure.

In contrast to the eighth amendment aspect of *Wright*, here the standard for defining "unjustified punishment" would be the same in the due process hearing as in the state litigation involving the privilege, because the liberty interest of the pupil is defined by the state law, not the fourteenth amendment.[99] This means that the substantive content of the privilege is not critical as long as some form of the teacher's privilege exists in the state and the privilege provides a forum for the resolution of disputes over the justification for the punishment. The Court found the Florida privilege, using the "reasonably necessary" test for civil cases and requiring only good faith for criminal cases, to be adequate to remove any need for a pre-punishment hearing.

The dissenters point out one problem with this result. Where the question is whether the teacher has identified the *actual violator*, that would be the precise issue presented at a pre-punishment hearing. In the post-punishment hearing, if the state has adopted a "reasonable mistake" component in its privilege the issue will be whether the teacher had reasonable grounds to believe he had the actual violator. There will never be a determination of the precise issue that would have been determined in the pre-punishment hearing, and the teacher will never be liable for punishing the wrong pupil. The policy behind the mistake doctrine in the privilege is sound, but it makes it impossible for the pupil to ever have resolved the issue that would have been resolved in the due process hearing. Yet the Court held the due process hearing unnecessary, because the later state litigation provided an adequate forum to resolve that justification issue.

The Indiana privilege is similar to the Florida rule with the exception that in criminal battery cases the teacher's mistaken belief

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[99]Board of Regents v. Roth, 408 U.S. 564, 577 (1972): "[Fourteenth amendment] interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law . . . ." *See also* Perry v. Sindermann, 408 U.S. 593, 603 (1972) (Burger, C.J., concurring).

in the existence of the objective elements must be reasonable in addition to being in good faith, whereas in Florida good faith alone is sufficient. Therefore, the Indiana rule would probably be adequate to remove the need for any pre-punishment procedures.

Criminal Discovery in Indiana: Its Past and Future

*David R. Joest**

In recent years, criminal discovery has emerged from relative obscurity to become recognized as an important area of Indiana criminal procedure. Unlike civil discovery, which is defined and regulated by the Indiana Rules of Trial Procedure,[1] criminal discovery has developed almost exclusively by judicial decision. This mode of development has resulted in a less orderly and consistent structure of criminal discovery law than would have been expected had criminal discovery been provided for by statute or court rule.

It is the position of this author that the present disorganized state of criminal discovery law impedes the effective service of the ends for which discovery is provided and that a comprehensive scheme of criminal discovery should be enacted by rule of the Supreme Court of Indiana. This Article will review the development of criminal discovery in this state, will compare its present status to that of civil discovery and to the alternative systems of criminal discovery, and will examine the alternatives available for developing a coherent system of criminal discovery law.

I. The Development of Indiana Criminal Discovery

As late as 1967, Professor Lester Orfield spoke deploringly of the limited discovery available in Indiana criminal proceedings while advocating the enactment of statutory provisions for expanding discovery.[2] The minimal statutory provisions in existence then remain in force today. Depositions can be taken by the defendant, and once the defendant has done so, depositions can be taken by the state.[3] The notice of alibi statute[4] requires a defendant intending to present an alibi defense to give formal notice to the prosecutor, specifying the "exact place at which the defendant claims to have been."[5] By this notice, the defendant can require the prosecutor to file "a specific statement in regard to the exact date which the prosecution proposes to present at the trial as the date when, and the exact place that the prosecution proposes to present at the trial as

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[1] Ind. R. Tr. P. 26-37.

[2] Orfield, *Criminal Discovery in Indiana*, 1 Ind. Legal F. 117 (1967).

[3] Ind. Code § 35-1-31-8 (1976) (originally enacted as ch. 169, § 242, 1905 Ind. Acts 584, 637).

[4] *Id.* §§ 35-5-1-1 to -3 (originally enacted as ch. 228, §§ 1-3, 1935 Ind. Acts 1198).

[5] *Id.* § 35-5-1-1.

the place where, the defendant was alleged to have committed or to have participated in the offense."[6] The statutes regulating the form of indictments[7] and charging affidavits[8] in effect at that time required that the names of all material state's witnesses be endorsed in those pleadings. The remedy for the state's failure to list a witness, however, was only to deny the state a continuance in the event an unlisted witness failed to appear.[9]

Although early cases contained some suggestion that production of tangible evidence by the state[10] and discovery of witnesses' prior statements[11] by the defendant at trial might in some cases be proper, until 1967, no judicial decisions had actually required any discovery to the defendant. The year 1967 marked the beginning of a revolution in criminal discovery law through judicial decision. In that year in *Bernard v. State*,[12] the Indiana Supreme Court recognized the inherent power of courts to provide for criminal discovery by upholding the right of a defendant to obtain a list of the state's witnesses before trial. Subsequently, in *Antrobus v. State*,[13] the same court permitted in-trial discovery of a state witness' prior statements, including his grand jury testimony, after the witness had testified on direct examination.

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[6]*Id.* § 35-5-1-2. In spite of the words "exact date," the state is required to specify the date and time of day, as well as the place. Pearman v. State, 233 Ind. 111, 117 N.E.2d 362 (1954). *But see* Hampton v. State, 359 N.E.2d 276 (Ind. Ct. App. 1977). As to the specificity with which the place of the offense must be designated, *see* Mitchell v. State, 360 N.E.2d 221, 223 (Ind. Ct. App. 1977).

Professor Orfield also viewed the statute requiring special pleading of the defense of insanity, IND. CODE § 35-5-2-1 (1976), as a form of discovery for the state. Orfield, *supra* note 2, at 130.

[7]Ch. 169, § 112, 1905 Ind. Acts 584 (superseded by Pub. L. No. 325, sec. 3, § 2 (6)(c), 1973 Ind. Acts 1750, 1776, codified in IND. CODE § 35-3.1-1-2 (1976)).

[8]Ch. 169, § 119, 1905 Ind. Acts 584 (superseded by Pub. L. No. 325, sec. 3, § 2 (6)(c), 1973 Ind. Acts 1750, 1776, codified in IND. CODE § 35-3.1-1-2 (1976)).

[9]Denton v. State, 246 Ind. 155, 203 N.E.2d 539 (1965). The present statute enacted in 1973 retains this provision. IND. CODE § 35-3.1-1-2(c)(1976).

[10]Anderson v. State, 239 Ind. 372, 376, 156 N.E.2d 384, 386 (1959). *See* Orfield, *supra* note 2, at 127.

[11]McDonel v. State, 90 Ind. 320, 321-22 (1883). *But see* Lander v. State, 238 Ind. 680, 686, 154 N.E.2d 507, 510 (1958). *See generally* Orfield, *supra* note 2, at 122-23.

[12]248 Ind. 688, 230 N.E.2d 536 (1967). The court explained that discovery to the accused, while not constitutionally required, was within the inherent authority of the courts to regulate criminal procedure. *Id.* at 691, 230 N.E.2d at 539.

[13]253 Ind. 420, 254 N.E.2d 873 (1970). The court effectively overruled Anderson v. State, 239 Ind. 372, 156 N.E.2d 384 (1959), where the court had noted that discovery of a witness' pre-trial statements should be ordered where a "direct conflict" with trial testimony could be shown, or where the statements would "prove the innocence of the accused." *Id.* at 376, 156 N.E.2d at 386. The court in *Antrobus* stated that "the better rule does not require a defendant to prove an inconsistency . . . before he even knows what the witness said in the statement." 253 Ind. at 428, 254 N.E.2d at 877.

In both *Bernard* and *Antrobus*, the supreme court required the defendant to establish a foundation for the discovery of the items sought,[14] and upon laying the proper foundation, allowed the trial court only "limited discretion" to overrule the motion. The court could deny discovery only where the state showed a "paramount interest in nondisclosure."[15] Even before *Antrobus*, the "paramount interest" principle was applied to the statutory procedure for the taking of depositions.[16] The broad right seemingly conferred by the statute upon the defendant to depose witnesses was held to be subject to the court's power to prevent depositions if the state could establish a paramount interest in preventing deposition of its witnesses.

Bernard created the framework for the establishment of a comprehensive scheme of criminal discovery. In 1969, Judge Hunter wrote that *Bernard* held that "after a defendant has shown that *discovery* is necessary to preparation of his case, it should be granted absent a more compelling showing by the state."[17] In *Dillard v. State*,[18] Justice DeBruler, who also authored *Antrobus*, expanded the principles of *Bernard* and *Antrobus* to discovery in general. In *Dillard*, the defendant had sought disclosure of all relevant police reports and memoranda. The foundation for discovery established by the court required a sufficient designation of the items to be discovered and a showing of their materiality to the defense. Furthermore, where the state could show a paramount interest in non-

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[14]In Bernard v. State, 248 Ind. 688, 230 N.E.2d 536 (1967), the court recognized that a list of the state's witnesses would be clearly beneficial to the defense, therefore, in the absence of a showing of a paramount state interest in non-disclosure, the showing required of the defendant was minimal. As a later case explained, the materiality of such a list is self-evident. Dillard v. State, 257 Ind. 282, 292, 274 N.E.2d 387, 392 (1971).

In Antrobus v. State, 253 Ind. 420, 254 N.E.2d 873 (1970), the defendant was required to show:

> (1) The witness whose statement is sought has testified on direct examination; (2) a substantially verbatim transcription of the statements made by the witness prior to trial is shown to probably be within the control of the prosecution; and, (3) the statements relate to matters covered in the witness' testimony in the present case.

Id. at 427, 254 N.E.2d at 876-77.

[15]Bernard v. State, 248 Ind. at 692, 230 N.E.2d at 540; Antrobus v. State, 253 Ind. at 427, 254 N.E.2d at 877.

[16]Howard v. State, 251 Ind. 584, 244 N.E.2d 127 (1969); Amaro v. State, 251 Ind. 88, 239 N.E.2d 394 (1968); Nuckles v. State, 250 Ind. 399, 236 N.E.2d 818 (1968). *See also* Johnson v. State, 255 Ind. 589, 266 N.E.2d 57 (1971); Reynolds v. State, 155 Ind. App. 266, 292 N.E.2d 290 (1973).

[17]Howard v. State, 251 Ind. 584, 585, 244 N.E.2d 127, 128 (1969) (citing Bernard v. State, 248 Ind. 688, 230 N.E.2d 536 (1967)) (emphasis added).

[18]257 Ind. 282, 274 N.E.2d 387 (1971).

disclosure, discovery would not be permitted.[19] The defendant's request for production of the reports in *Dillard* failed for want of a sufficiently particular designation.

In 1972, Justice DeBruler wrote the opinion in *Sexton v. State*,[20] which allowed a defendant, who had no memory of the facts alleged due to electric shock therapy, to discover both his own statement to the police and a police diagram of the crime scene. The defendant was held to have satisfied *Dillard* by designating the items sought with reasonable particularity and by showing that, due to his inability to recall the facts of the offense, the materials were necessary to the preparation of his defense. As there was no showing of a paramount interest by the state in nondisclosure, the trial court was held to have had no discretion to deny the motion.

Thus, by 1972, a general criminal discovery framework seemed to have been constructed. As a preliminary matter, the defendant was required to specify the material sought with some particularity: For example, "all inter-office memos, notes and reports, of all law enforcement agencies, concerning this robbery" is insufficiently specific.[21] A showing of some need for the discovery was also necessary. In this regard, *Dillard* distinguished items of "self-evident" materiality—witness lists, for example—from other items whose materiality the defendant was required to show affirmatively.[22] The degree of need required to be shown was apparently more than simply the convenience of being able to review the state's file and preview its evidence.[23] Absent the state's showing of a paramount interest in nondisclosure, the court was required to order production.[24]

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[19]*Id.* at 291, 274 N.E.2d at 392.

[20]257 Ind. 556, 276 N.E.2d 836 (1972).

[21]Dillard v. State, 257 Ind. at 292, 274 N.E.2d at 392.

[22]*Id.* at 291, 274 N.E.2d at 392. *See* note 14 *supra.*

[23]In *Dillard*, appellant's attempt to discover all reports prepared by any law enforcement agency relating to the crime charged was characterized as "nothing more than a fishing expedition or an attempted rummaging about in the police files hoping to turn up something to use at the trial." 257 Ind. at 292, 274 N.E.2d at 392-93. Compare this with the degree of need for the requested items shown in *Sexton*, discussed at note 20 *supra* and accompanying text. In Kleinrichert v. State, 260 Ind. 537, 297 N.E.2d 822 (1973), a request for records relating to a prostitute's customers was held properly refused for want of a showing of materiality.

[24]Apart from the general "limited discretion" standard, there was already a fully discretionary discovery procedure operating at the time. *Dillard* held that the trial court had discretionary authority to order production of witness' statements before trial when *Antrobus* did not apply, because the witness had not yet testified. 257 Ind. at 294, 274 N.E.2d at 393.

In Cherry v. State, 258 Ind. 298, 280 N.E.2d 818 (1972), the court upheld a trial court's failure to order production of witness statements before trial. Justice Prentice wrote: "Under proper circumstances, the trial court might entertain a motion of this

In 1974, the Indiana Supreme Court both widened the scope and restructured the framework of criminal discovery in *State ex rel. Keller v. Criminal Court.*[25] In *Keller*, the local discovery rules of a trial court were challenged by both the defendant and the prosecutor. Justice Arterburn, who had shown reserved enthusiasm for discovery in the earlier cases,[26] wrote the court's opinion upholding the rules. Relying on language from earlier cases that the power to provide for discovery is inherent in the trial court,[27] *Keller* affirmed the authority of the trial court to issue an order requiring the state to produce a list of the state's witnesses before trial; statements by the accused, co-defendants, and witnesses; grand jury testimony; reports and results of scientific and medical tests; tangible and documentary evidence; and criminal histories of witnesses.[28] The court also upheld the part of the order requiring the defendant to list his witnesses and defenses.[29] Finally, the court stated:

> We hold, as a matter of state law, that a trial court has the inherent power to balance discovery privileges between parties. Thus, if any statute should deny or fail to provide for full discovery within constitutional safeguards, the trial

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type at this stage of the proceedings. However, an 'Antrobus-type' foundation would have to be laid, and the material sought would have to fit the foundation." *Id.* at 300, 280 N.E.2d at 820.

Since the *Antrobus* foundation requires that the witness have testified at trial, the court could not have intended to require the showing of all of the *Antrobus* elements and may have actually had the *Dillard* foundation in mind.

The burden of showing the paramount interest was apparently borne by the state. In *Sexton*, the court refused to hypothesize state interests in nondisclosure, or to require the defendant to negate possible interests, but assumed from the failure of the state to advance any interests in nondisclosure that none existed.

[25]262 Ind. 420, 317 N.E.2d 433 (1974). *See* Kerr, *Criminal Law and Procedure, 1975 Survey of Recent Developments in Indiana Law*, 9 IND. L. REV. 160, 178-79 (1975); Note, Keller, *Prosecutorial Discovery and the Privilege Against Self-Incrimination*, 9 IND. L. REV. 623 (1976).

[26]Justice Arterburn dissented in *Bernard*, 248 Ind. at 696, 230 N.E.2d at 542, and in Johns v. State, 251 Ind. 172, 240 N.E.2d 60 (1968) (conviction reversed for failure to provide complete witness list). He concurred separately in *Antrobus*, 253 Ind. at 436, 254 N.E.2d at 881, and concurred in the result in *Dillard*. In *Sexton*, he dissented in part, opposing the disclosure of the state's work product and questioning whether the court would allow reciprocal prosecutorial discovery of defense preparations. 257 Ind. at 562, 276 N.E.2d at 840.

[27]State *ex rel.* Keller v. Criminal Court, 262 Ind. at 423, 317 N.E.2d at 435 (citing Bernard v. State, 248 Ind. 688, 230 N.E.2d 536 (1967)); Johns v. State, 251 Ind. 172, 240 N.E.2d 60 (1968); Antrobus v. State, 253 Ind. 420, 254 N.E.2d 873 (1970).

[28]262 Ind. at 421-22, 317 N.E.2d at 434.

[29]*Id.* at 424-25, 317 N.E.2d at 436. This part of the opinion has been criticized. Note, Keller, *Prosecutorial Discovery and the Privilege Against Self-Incrimination*, 9 IND. L. REV. 623 (1976). The part of the order requiring the defendant to submit to physical examination and testing was not challenged.

> court may balance the discovery procedure regardless of any omission or prohibition in the statute.[80]

Justice DeBruler dissented in part,[81] arguing that the order required the accused to incriminate himself and that the *Keller* scheme of discovery was too broad:

> This order as I understand it requires the State to open its file to the accused upon a simple unspecific request to do so. In [*Antrobus*] and [*Dillard*] we set forth specific procedures that the accused must follow in order to successfully move for discovery. The interests of the accused and the State were carefully considered at each step. On the other hand, this order which the majority sanctions, subjects the State, without a showing of particularized need and a showing that the information being sought is not otherwise available to the accused, to a vague and overbroad command the perimeters of which are not discernible, resulting in needless waste, frustration, and expense.[82]

Since *Keller*, the paramount factor in criminal discovery has been the discretion of the trial court to order disclosures on such terms as it deems fit. *Keller* itself offers few guidelines for the exercise of that discretion. This situation produces a number of unfortunate results. Discovery is not uniform throughout the state,[83] and

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[80]262 Ind. at 429, 317 N.E.2d at 438.

[81]Since the court had denied both parties' applications for extraordinary relief, Justice DeBruler was technically concurring in the result. However, the majority had "affirmed" the trial court's discovery order, and he dissented from this holding. *Id.* at 430, 317 N.E.2d at 438.

[82]*Id.* at 432, 317 N.E.2d at 440 (citations omitted).

In Reid v. State, No. 107 S 345 (Ind. Feb. 6, 1978), the Indiana Supreme Court recognized limits on the *scope* of discovery after *Keller*, holding that an uncontested order requiring disclosure by the prosecution of "all evidence . . . relevant to the . . . charge" was overly broad:

> We believe that the State could not properly be involuntarily subjected to a general order to disclose *all information relevant to the subject matter or which may in any manner aid the accused in the ascertainment of the truth*, because such an order would place too great a burden upon it—a burden to assess and reassess its information, and to anticipate and speculate constantly as to the relevance of bits of information and the possible use the defendant might make of them. In effect, it would all but put the responsibility for the defense upon the state.

Id., slip op. at 7. The court also noted the difficulty in ascertaining whether such an order has been violated, which is simply to say that the vagueness of the order unduly burdens the courts as well as the prosecution.

[83]The court in *Keller* had recognized that the "better approach" to discovery development was by rule-making and suggested that such rules were forthcoming. 262 Ind. at 429, 317 N.E.2d at 438. However, in view of the supreme court's holding that

the rights of litigants to discovery may diminish or expand with a change of venue. Parties have no guidance as to what showing will be required of them as a prerequisite to obtaining disclosures. The abuse-of-discretion standard of appellate review allows the courts, both trial and appellate, to dispose of discovery issues without articulating those factors that the courts consider in exercising their discretion. Discovery issues may be dismissed with no more discussion than stating that discovery is discretionary with the trial court.[34] Finally, trial courts may themselves be confused as to their duties with respect to discovery. One case decided since *Keller* has suggested that defendants retain the qualified right to in-trial production upon the laying of an *Antrobus* foundation at least with regard to witness' pre-trial statements.[35]

II. Attempts at Codification of Discovery Law and Procedure

The *Keller* court recognized that codification of discovery rules might well be preferable to "piecemeal" development by judicial decision.[36] The most obvious ways in which such codification could occur is through statute or court rules. An attempt at statutory codification occurred in 1972 when the Indiana Criminal Law Study Commission drafted its proposed Indiana Code of Criminal Pro-

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trial courts might disregard limitations on discovery set out in rules and statutes, *see* note 30 *supra* and accompanying text, such rules might not provide much uniformity.

[34]*See* Hudson v. State, 354 N.E.2d 164 (Ind. 1976); Owens v. State, 263 Ind. 487, 333 N.E.2d 745 (1975).

In Murphy v. State, 352 N.E.2d 479 (Ind. 1976), the court reversed a conviction on the grounds that the trial court had abused its discretion in refusing to order the taking of depositions by the indigent defendant at public expense. The court, which before *Keller* had held that only the showing of a paramount interest by the state sufficed to prevent the defendant from deposing the state's witnesses, Amaro v. State, 251 Ind. 88, 239 N.E.2d 394 (1968), held that the trial court's decision was "speculative and arbitrary" because no findings of fact were made nor evidence presented to show why the request was unwarranted. 352 N.E.2d at 482. The court held that *Keller* had superseded the deposition statute, Ind. Code § 35-1-31-8 (1976), and implicitly had modified the *Amaro* line of cases. *See* note 16 *supra*. This case and Brewer v. State, 362 N.E.2d 1175 (Ind. Ct. App. 1977), which involved a situation similar to *Murphy*, are the only cases subsequent to *Keller* in which it has been found that the trial court abused its discretion in denying discovery of sanctions.

[35]Morris v. State, 263 Ind. 370, 332 N.E.2d 90 (1975). "[A] defendant has a right, upon the laying of a proper foundation, to statements made by a witness to law enforcement officers and to the grand jury only *after* the witness has testified on direct examination." *Id.* at 376 (quoting Antrobus v. State, 253 Ind. at 420, 254 N.E.2d at 873).

The court also upheld the defendant's right to a witness list under *Bernard*. 263 Ind. at 376, 332 N.E.2d at 93. *See also* Marlett v. State, 348 N.E.2d 86 (Ind. Ct. App. 1976); Lockridge v. State, 263 Ind. 678, 338 N.E.2d 275 (1975).

[36]262 Ind. at 429, 327 N.E.2d at 438.

cedure,[37] which included a chapter regulating discovery.[38] The proposed code adopted the position of the Amercian Bar Association's Project on Standards for Criminal Justice: "[D]iscovery should be as full and free as possible."[39]

The proposed code listed items subject to discovery by the prosecution and the defense, which were similar to those enumerated in the local rule in *Keller*.[40] It retained the *Bernard* standard for determining the necessity for the production of a requested item: The trial court was permitted to deny the motion only upon the showing of a paramount interest in nondisclosure.[41] A "work product" privilege and informant's identity privilege were included, subject to an exception where the material exculpates the defendant.[42] Disclosure not required under the first section could be granted in the court's discretion upon a showing of materiality to the defense.[43] The court was also given discretion to regulate the manner of discovery,[44] and to impose sanctions for noncompliance with discovery orders.[45]

The proposed code may have been unduly rigorous in requiring the state to bear the burden of showing why discovery should not be ordered upon the state. It also missed an opportunity to define "paramount interest in nondisclosure" by not specifying what interests the nondisclosure standard protected. Specifically, the proposed code left unsettled whether factors such as expense, inconvenience, and harassment with excessive requests for production

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[37]*See* INDIANA CRIMINAL LAW STUDY COMMISSION, INDIANA CODE OF CRIMINAL PROCEDURE: PROPOSED FINAL DRAFT (1972) [hereinafter cited as CODE OF CRIMINAL PROCEDURE: PROPOSED FINAL DRAFT].

[38]*Id.* §§ 35-5.1-4-1 to -8.

[39]*Compare* ABA STANDARDS RELATING TO DISCOVERY AND PROCEDURE BEFORE TRIAL § 1.2 (Approved Draft, 1970) [hereinafter cited as ABA STANDARDS] *with* CODE OF CRIMINAL PROCEDURE: PROPOSED FINAL DRAFT, *supra* note 37, § 35-5.1-4-1(b).

This is also the position adopted in *Keller*. *See* 262 Ind. at 429, 317 N.E.2d at 438.

[40]CODE OF CRIMINAL PROCEDURE: PROPOSED FINAL DRAFT, *supra* note 37, § 35-5.1-4-1(b). Both this section and Judge Wilson's local rules in *Keller* bear a resemblance to the list in the ABA STANDARDS, *supra* note 39, § 2.1.

[41]CODE OF CRIMINAL PROCEDURE: PROPOSED FINAL DRAFT, *supra* note 37, § 35-5.1-4-1(c). The section specifies that the state must prove the interest in nondisclosure by a "clear preponderance" of the evidence, and sets out the danger of harm to or harassment of a witness and the facilitation of perjury as examples of paramount interest. The examples are apparently taken from Johns v. State, 251 Ind. 172, 240 N.E.2d 60 (1968).

[42]CODE OF CRIMINAL PROCEDURE: PROPOSED FINAL DRAFT, *supra* note 37, § 35-5.1-4-1(d).

[43]*Id.* § 35-5.1-4-2.

[44]*Id.* § 35-5.1-4-6(a).

[45]*Id.* § 35-5.1-4-6(d).

were to be considered.[46] Nonetheless, the proposed code discovery provisions were the product of considerable thought and research,[47] and had the virtue of introducing order and rationality into the discovery process. The discovery chapter was not included, however, in the version of the Code of Criminal Procedure enacted into law in 1973.[48]

An alternative to statutory discovery procedure is regulation by court rules; the supreme court early recognized its inherent power to provide for discovery.[49] In civil cases, a comprehensive scheme of discovery is contained in the Trial Rules.[50] An obvious and convenient mode of providing such a scheme for criminal discovery might be the adoption of the civil rules in criminal prosecutions.[51] However, this approach has not been adopted.

Even before the adoption of the Indiana Trial Rules, the supreme court had declined to hold that a civil discovery statute[52] or equitable discovery rules[53] applied in criminal cases. *Bernard* marked no departure from this rule; the court explicitly disclaimed the applicability of "the rules of civil practice"[54] to criminal discovery.[55] The supreme court decided *Antrobus* hardly a month after its adop-

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[46]*Dillard* suggested that such factors could be taken into account. 257 Ind. at 292, 274 N.E.2d at 392. *Keller* mentioned cost and efficiency as factors for the trial court to consider, but of course *Keller* was concerned with a different standard. 262 Ind. at 423, 317 N.E.2d at 435.

[47]The comments to the Proposed Code of Criminal Procedure and its companion, the Proposed Penal Code, INDIANA CRIMINAL STUDY LAW COMMISSION, INDIANA PENAL CODE: PROPOSED FINAL DRAFT (1974), are valuable research aids in the field of Indiana criminal law.

[48]Pub. L. No. 325, ch. 2(6)(c), 1973 Ind. Acts 1757.

[49]Bernard v. State, 248 Ind. 688, 691, 230 N.E.2d 536, 539 (1970).

[50]IND. R. TR. P. 26-37.

[51]This is particularly true in view of the Criminal Rule providing that the Trial Rules apply to criminal cases "so far as they are not in conflict with any specific rule adopted by this court for the conduct of criminal proceedings." IND. R. CRIM. P. 21.

[52]Ch. 38, § 354, 1881 Ind. Acts 240 (Spec. Sess.) (repealed 1969) (formerly codified at IND. STAT. ANN. § 2-1645 (Burns 1946)). A statute, ch. 169, § 344, 1905 Ind. Acts 584 (superseded by IND. CODE 35-4.1-2-2 (1976)), rendered civil procedure rules applicable to criminal prosecutions.

In Weer v. State, 219 Ind. 217, 36 N.E.2d 787 (1941), the court assumed that the statute applied in order to hold that the appellant was not entitled to discovery.

[53]Lander v. State, 238 Ind. 680, 154 N.E.2d 507 (1958).

[54]Prior to the adoption of the trial rules, statutory provisions existed for the taking of depositions, ch. 38, §§ 287-318, 1881 Ind. Acts 292-98 (repealed 1969); for interrogatories, ch. 38, § 318, 1881 Ind. Acts 305 (amended by ch. 53, § 1, 1965 Ind. Acts 85) (repealed 1969); for admission of execution of documents, ch. 38, § 352, 1881 Ind. Acts 305-06 (repealed 1969); and for court ordered production of documentary evidence, ch. 38, §§ 353-354, 1881 Ind. Acts 306 (amended by ch. 140, § 1, 1965 Ind.Acts 219) (repealed 1969). All of these statutes were repealed by ch. 191, § 3, 1969 Ind. Acts 715-17.

[55]248 Ind. at 691, 230 N.E.2d at 539.

tion of the Trial Rules,[56] but gave no indication that those rules would apply in criminal prosecutions:

> The rules of discovery applicable in civil proceedings in Indiana courts are not applicable as such in criminal proceedings. However, the *techniques* of discovery embodied in those rules will often be applicable in criminal proceedings and the trial court has the inherent power to implement such discovery techniques as are necessary to provide the defendant a full and fair hearing.[57]

In *Dillard*, the court resorted to Trial Rule 34, which provides for the production and inspection of tangible and documentary evidence for assisting in defining the "sufficient designation" element of the *Antrobus* foundation.[58] The court borrowed language from Trial Rule 34 to hold that an item must be described with "reasonable particularity."[59] Both Trial Rule 34[60] and *Dillard* deal with production of materials. However, while Trial Rule 34 requires no foundation to be established as a prerequisite,[61] *Dillard* adopts what amounts to the requirement of a showing of good cause.

In 1972, the supreme court substantially applied the Trial Rule 26[62] definition of the scope of discovery to criminal proceedings.[63] In upholding the denial of an order to produce the results of a polygraph examination, the court noted that such results were "not only . . . inadmissible . . . but . . . would neither lead to any additional evidence nor aid the appellant in the preparation of his defense."[64]

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[56]The rules became effective Jan. 1, 1970.

[57]253 Ind. at 423, 254 N.E.2d at 874.

[58]*See* notes 14 & 15 *supra* and accompanying text. *Dillard* reaffirmed the three-pronged *Antrobus* foundation requirement, and references in later cases to *Dillard* foundations are in fact referring to *Antrobus*.

[59]257 Ind. at 292, 274 N.E.2d at 392.

[60]IND. R. TR. P. 34 is entitled: "Production of Documents and Things and Entry upon Land for Inspection and Other Purposes."

[61]Trial Rule 34 does not require a showing of good cause for production. 3 W. HARVEY, INDIANA PRACTICE 5 (1970).

[62]Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject-matter involved in the pending action . . . . It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

IND. R. TR. P. 26(B)(1).

In Reid v. State, No. 107 S 345 (Ind. Feb. 6, 1978), the supreme court relied on IND. R. TR. P. 26(E) to hold that discovery orders in criminal prosecutions impose a continuing duty to disclose.

[63]Zupp v. State, 258 Ind. 625, 283 N.E.2d 540 (1972).

[64]*Id.* at 630-31, 283 N.E.2d at 543. The court cited *Antrobus* rather than Trial Rule 26. The quoted language might be considered a definition of the materiality of the *Dillard* foundation. *See* text accompanying notes 18-19 *supra*.

An area of increasing concern to the courts has been discovery sanctions. Trial Rule 37 sets out a comprehensive scheme of procedures to be employed in regulating civil discovery as well as the remedies to which the court may resort. The supreme court early held that the appropriate sanction for the state's failure to make ordered disclosures was a continuance.[65] Defendants have argued that evidence not disclosed should be excluded;[66] that witnesses not named should not be permitted to testify;[67] or as an ultimate sanc-

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[65]Johns v. State, 251 Ind. 172, 240 N.E.2d 60 (1968). In *Johns*, the state failed to completely comply with an order to produce a witness list yet made no showing that it could not or should not be required to respond. Although the court recognized that a continuance was generally an appropriate remedy in cases of this kind, it held it was reversible error for the trial court to permit the undisclosed witness to testify in the particular circumstances of this case.

Johns is much cited by defendants who hope to fit the facts of their cases into its mold, but the courts have not been eager to apply so serious a sanction. The Second District Court of Appeals fashioned a practical remedy in Marlett v. State, 348 N.E.2d 86 (Ind. Ct. App. 1976). The court remanded the case for an evidentiary hearing at which the testimony in question was to be produced, holding that the trial court had erroneously refused to order production of a transcript of grand jury testimony after the defendant established the necessary *Antrobus* foundation. If this testimony was found to contain sufficient discrepancy from the witness' trial testimony to warrant its use for impeachment, the court was to order a new trial.

The supreme court has also suggested that the "offending counsel" should be punished for contempt of the court's discovery order. Chatman v. State, 263 Ind. 531, 334 N.E.2d 673 (1975).

[66]Hudson v. State, 354 N.E.2d 164 (Ind. 1976); Chatman v. State, 263 Ind. 531, 334 N.E.2d 673 (1975).

[67]Lund v. State, 345 N.E.2d 826 (Ind. 1976); Luckett v. State, 259 Ind. 174, 284 N.E.2d 738 (1972).

In Henson v. State, 352 N.E.2d 746 (Ind. 1976), the court suggested that a showing of prosecutorial obstruction of the discovery process or the inadequacy of a continuance as a remedy would call for exclusion of evidence as a discovery sanction. *Id.* at 749.

In Reid v. State, No. 107 S 345 (Ind. Feb. 6, 1978), the court undertook an extensive analysis of the adequacy of a continuance to remedy a violation of a discovery order by the prosecution upon the facts of that particular case to support its conclusion that a continuance would have been adequate. Underlying Justice Prentice's discussion seems to be the unstated assumption that the purpose of discovery sanctions is not to punish the offending party but to assure that the noncompliance does not harm the case of the party seeking discovery. Since a continuance would serve to restore the accused to as good a position as he would have held had there been no violation, a continuance was a sufficient remedy. This seems to be a sensible position.

One post-*Keller* case, Owens v. State, 263 Ind. 487, 333 N.E.2d 745 (1975), went so far as to order a continuance to remedy the state's noncompliance with the notice of alibi statute, IND. CODE §§ 35-5-1-1 to -3 (1976), in lieu of the preclusion of proof remedy provided by statute. *Id.* § 35-5-1-3. *See* notes 4-6 *supra.*

The court's treatment of the issue is terse, and it is not clear whether the holding represents a conscious supersedure of the alibi statute or a misapplication of Reed v. State, 243 Ind. 544, 188 N.E.2d 533 (1963).

tion, the defendant should not be prosecuted.[68] The courts have consistently rejected these arguments.

In recent decisions, the courts have cited Trial Rule 37 for the proposition that discovery sanctions are discretionary with the trial court.[69] In *Keel v. State*,[70] the court of appeals, while noting an absence of cases applying Trial Rule 37 to criminal prosecutions, recognized an inherent discretionary power in the trial court to exclude testimony or evidence because of noncompliance with the court's discovery order. This embraces a narrow part of Trial Rule 37's broad options.[71]

The one area of criminal discovery to which the Trial Rules have been applied in their entirety is that of depositions. In *Carroll v. State*,[72] the supreme court applied Trial Rule 32(A) to the use of a deposition in a criminal trial. Although the statutory provision that allows the defendant to take depositions "to be read on the trial"[73] could be read to permit such depositions to be used at trial as substantive evidence without restriction, no case had ever construed it in this manner. In *Murphy v. State*,[74] the court held that the statute had been superseded by *Keller* and by the Trial Rules,[75] and that Trial Rules 30 and 31, governing the taking of depositions, applied to criminal prosecutions through Criminal Rule 21.[76] This is the only instance to date of the application of an entire civil discovery rule to criminal procedure.

Aside from the area of depositions, there has been no wholesale borrowing from the Trial Rules in the formulation of the rules of criminal discovery. The adoption of the "techniques" of civil

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[68]Lund v. State, 345 N.E.2d 826 (Ind. 1976).

[69]French v. State, 362 N.E.2d 834 (Ind. 1977); Lund v. State, 345 N.E.2d 826 (Ind. 1976); Block v. State, 356 N.E.2d 683 (Ind. 1970); Keel v. State, 333 N.E.2d 328 (Ind. Ct. App. 1975).

[70]333 N.E.2d 328 (Ind. Ct. App. 1975); *See also* State v. Buza, 324 N.E.2d 824 (Ind. Ct. App. 1975).

[71]IND. R. TR. P. 37(B)(3) authorizes the trial court to exclude evidence or to order evidence to be taken as established in enforcing discovery orders.

In *Keel*, the court of appeals referred to this sanction as a "protective order"; the protective order is a device provided by Trial Rule 26(C) to prevent the oppressive use of discovery.

[72]263 Ind. 696, 338 N.E.2d 264 (1975).

[73]IND. CODE § 35-1-31-8 (1976).

[74]352 N.E.2d 479 (Ind. 1976). *See also* Brewer v. State, 362 N.E.2d 1175 (Ind. Ct. App. 1977).

[75]352 N.E.2d at 482.

[76]*Id.* IND. R. CRIM. P. 21 provides: "The Indiana Rules of trial and appellate procedure shall apply to all criminal appeals so far as they are not in conflict with any specific rule adopted by this court for the conduct of criminal proceedings."

discovery, predicted in *Antrobus*, has not visibly materialized.[77] This is not necessarily an undesirable result. The Trial Rules were adopted to implement policies and to deal with problems inherent in civil trials; the policies and problems of criminal procedure are sufficiently different from those of civil procedure to warrant separate discovery rules. As the supreme court has recognized its authority to do so,[78] it should adopt specific rules for criminal discovery.

III. Alternatives for Rules of Criminal Discovery Procedure

In considering what is desirable in criminal discovery, it would be well to begin by isolating and examining the purposes of such discovery, the interests to be served, and the dangers to be avoided. *Keller* stated: "[C]riminal discovery is designed to improve the efficiency of the criminal justice system. The idea of a trial as a sport or game is not only a reflection on the judicial process, but it is wasteful of human intelligence and technique."[79] The American Bar Association's Project on Standards for Criminal Justice has made a more extensive listing of discovery purposes:

> (a) Procedures prior to trial should serve the following needs:
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> (i) to promote an expeditious as well as fair determination of the charges, whether by plea or trial;
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> (ii) to provide the accused sufficient information to make an informed plea;
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> (iii) to permit thorough preparation for trial and minimize surprise at trial;
>
> (iv) to avoid unnecessary and repetitious trials by exposing any latent procedural or constitutional issues and affording remedies therefor prior to trial;
>
> (v) to reduce interruptions and complications of trials by identifying issues collateral to guilt or innocence, and determining them prior to trial; . . ., and
>
> (vi) to effect economies in time, money, and judicial and

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[77]In Gutowski v. State, 354 N.E.2d 293 (Ind. Ct. App. 1976), the court of appeals recapitulated the relationship between the trial rules and criminal discovery as follows: "The trial court has the inherent power to apply the techniques of discovery embodied in the civil rules and is not bound by the limiting language contained in those civil rules." *Id.* at 296. While this statement is undoubtedly correct in light of the language from *Keller* quoted above, *see* text accompanying note 30 *supra*, it is an unfortunate rule that fails to guide the trial court in the exercise of its discretion.

[78]Neeley v. State, 261 Ind. 434, 305 N.E.2d 434 (1974); State v. Bridenhager, 257 Ind. 699, 279 N.E.2d 794 (1972).

[79]262 Ind. at 423, 317 N.E.2d at 435.

> professional talents by minimizing paperwork, repetitious assertions of issues, and the number of separate hearings.[80]

The interests contained in these standards include not only efficiency of the criminal justice system, but also the fairness of that process to the accused. However, the interest of fairness to the defendant is already protected by the constitutional doctrine of due process, which prohibits the state from using evidence known to be false or perjured[81] and from suppressing exculpatory evidence.[82]

The purposes of criminal discovery differ from those of civil discovery in one very important respect. A principal function of civil discovery is the narrowing of the issues,[83] which are only vaguely framed by the pleadings under the Trial Rules. This purpose is not applicable to criminal procedure. While the pleadings in civil cases are intended only to serve notice of the transaction upon which the action is based to the opposing party,[84] the criminal indictment or in-

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[80]ABA STANDARDS, *supra* note 39, § 1.1. The standards enumerate needs to be served not only by discovery but by pre-trial procedures generally.

[81]Napue v. Illinois, 360 U.S. 264 (1959).

[82]Brady v. Maryland, 373 U.S. 83 (1963). While *Brady* contemplated that the defense would request the material alleged to be exculpatory, the United States Supreme Court has since emphasized that the prosecutor must disclose evidence without specific request if the evidence is sufficiently substantial to create "reasonable doubt that did not otherwise exist." United States v. Agurs, 427 U.S. 97, 112 (1976).

Indiana law anticipated *Agurs*. In Birkla v. State, 263 Ind. 37, 323 N.E.2d 645 (1975), the Indiana Supreme Court held that destruction of potentially material evidence prior to a request for production by the defense places a "heavy burden" on the prosecution to show that the destruction of the evidence did not prejudice the defendant. *Id.* at 43, 323 N.E.2d at 649. *See also* Newman v. State, 263 Ind. 569, 334 N.E.2d 684 (1975).

The *Brady* doctrine should not be confused with court-ordered discovery, as some practitioners do. Court-ordered discovery is usually held not to be constitutionally required. United States v. Augenblick, 393 U.S. 348 (1969); Johnson v. State, 255 Ind. 589, 266 N.E.2d 57 (1971); Gubitz v. State, 360 N.E.2d 259 (Ind. Ct. App. 1977). Due process is concerned with *suppression* of evidence—the total withholding of evidence from the trier of fact by the prosecution—and ordinarily is not concerned with pre-trial disclosure of information to the accused for the preparation of his defense. But there is no reason for the courts not to find that the assistance of counsel clause of the sixth amendment guarantees at least minimal pre-trial discovery in order to insure meaningful investigation and preparation. One federal court has held that due process requires the prosecution to permit the defense access to ballistics evidence for expert examination. Barnard v. Henderson, 514 F.2d 744 (5th Cir. 1975). *See also* White v. Maggio, 556 F.2d 1352 (5th Cir. 1977).

[83]C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2001, at 15 (1970).

[84]IND. R. TR. P. 8(a) requires a "short and plain statement of the claim" and a demand for relief. The Civil Code Study Commission Comments to Trial Rule 8, *quoted in* 1 W. HARVEY, INDIANA PRACTICE 476 (1969), state:

> This subdivision establishes the concept of notice pleading and eliminates the constraining doctrines of the code concept of the "cause of action." Historically, pleadings have had four functions: (1) giving notice of the nature of the

formation is required to state "the nature and elements of the crimes charged in plain and concise language."[85] Under a prior statute, the supreme court has held that Indiana criminal law does not recognize the bill of particulars because any charging instrument so vague as to justify a bill is subject to a motion to quash.[86]

The prime danger in criminal discovery was traditionally assumed to be that of perjury.[87] The defendant, once apprised of the specifics of the case against him, would fabricate evidence to meet the charges. This view has been somewhat discredited in recent years.[88] As Justice William Brennan has written:

> I must say that I cannot be persuaded that the old hobgoblin perjury . . . supports the case against criminal discovery. I should think rather that its complete fallacy has been starkly exposed through the extensive and analogous experience in civil causes where liberal discovery has been allowed and perjury has not been fostered. Indeed, this experience has

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claim or defense; (2) stating facts each party believes to exist; (3) narrowing the issues; and (4) providing a means for speedy disposition of sham claims and unsubstantiated defenses. Rule 8(a) places the emphasis on the first of these functions (the giving of notice) and when read in conjunction with the rules as a whole, shifts the other functions to discovery, pre-trial conference, and summary judgment.

[85]IND. CODE § 35-3.1-1-2(a)(4) (1976). This section also requires the charging instrument to state the name of the offense, *id.* § 35-3.1-1-2(a)(2), and to cite the statute violated, *id.* § 35-3.1-1-2(a)(3). The time and place must be stated with sufficient specificity to show that the crime was committed within the period of the statute of limitations and to show proper venue, unless the time or place are elements of the offense in which case they must be stated "as definitely as can be done." *Id.* § 35-3.1-1-2(a)(5).

Various case law pleading requirements apply to individual offenses. For example, an indictment or information for involuntary manslaughter must allege the specific acts of the defendant that constitute reckless disregard for the safety of others. State v. Beckman, 219 Ind. 176, 37 N.E.2d 531 (1941). An information charging the commission of a felony while armed must set out the elements of the included or underlying felony. Goldstine v. State, 230 Ind. 343, 103 N.E.2d 438 (1952). A burglary charge must specify the felony that the accused intended to commit within the entered structure. Bays v. State, 240 Ind. 37, 159 N.E.2d 393 (1959). An information for conspiracy must allege the elements of the felony that was the object of the conspiracy. Landis v. State, 196 Ind. 699, 149 N.E. 438 (1925).

[86]Sherrick v. State, 167 Ind. 345, 79 N.E. 193 (1906). The "motion to make more specific" has also been held not to be recognized by Indiana criminal law. Hinshaw v. State, 188 Ind. 447, 124 N.E. 458 (1919).

The proposed Indiana Code of Criminal Procedure included a provision for a bill of particulars, CODE OF CRIMINAL PROCEDURE: PROPOSED FINAL DRAFT, *supra* note 37, § 35-3.1-1-3, but this feature was omitted from the Code as enacted.

[87]ABA STANDARDS, *supra* note 39, § 1.2, comments at 36-40.

[88]*Id.*

> suggested that liberal discovery, far from abetting, actually deters perjury and fabrication.[89]

In *Dillard*, the court recognized that intimidation, harassment, or harming of witnesses or informants might be another danger of criminal discovery.[90] The Proposed Code of Criminal Procedure tried to counter these dangers by listing facilitation of perjury and danger to "any person" as adequate grounds for denial of a request for discovery.[91]

Another possible danger to be avoided is the abuse of discovery procedures to prolong criminal prosecutions and to harass the prosecution with exorbitant demands for production. There is dicta indicating recognition of this possibility in *Dillard*.[92] Trial Rule 26 provides trial courts with the means to prevent discovery abuses that subject parties or other persons to "annoyance, embarrassment, oppression, or undue burden or expense" in civil matters.[93] The potential for such abuse in criminal cases, where the amount of and time for preparation by each party is ordinarily much less than in civil actions, is correspondingly greater.[94] A defendant should not be allowed to employ the threat of exhaustive discovery as a trump in plea negotiations or as a wrench with which to jam the workings of the criminal justice system.

Any scheme of discovery worthy of consideration, of course, should advance the interests sought to be served by criminal discovery while minimizing the potential for abuses. With this in mind, this discussion will turn to the alternatives to be faced in constructing any such scheme.

A. Scope of Discovery

The scope of criminal discovery in Indiana before *Keller* was quite restrictive. For example, the "materiality" showing required by *Dillard* was capable of harsh construction. As applied in *Sexton*

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[89]Brennan, *The Criminal Prosecution: Sporting Event or Quest for Truth?*, 1963 WASH. U.L.Q. 279, 291 (footnote omitted).

[90]257 Ind. 282, 274 N.E.2d 387 (1971).

[91]CODE OF CRIMINAL PROCEDURE: PROPOSED FINAL DRAFT, *supra* note 37, § 35-5.1-4-1(c).

[92]257 Ind. at 292, 274 N.E.2d at 392.

[93]IND. R. TR. P. 26(C).

[94]This may seem paradoxical in view of the often cited preponderance of resources which the prosecution, marshalling society's power, enjoys over the individual defendant. However, the prosecution must allocate finite resources among a great number of criminal investigations and prosecutions. Moreover, the prosecution consists of several mutally autonomous agencies, with differing outlooks and priorities, whose cooperation is often less than optimal.

v. State,[95] the materiality requirment seemed to demand that the material sought be beneficial to the preparation of the defandant's case and that the defendant be unable to obtain the materials or information for himself without hardship. The American Bar Association Standards' approach—arguably adopted in *Keller*[96]—that discovery be as "full and free as possible, consistent with the protection of persons, effective law enforcement, the adversary system, and national security"[97] probably represents the opposite extreme.

A scope of discovery as restrictive as that outlined in *Sexton* threatens to impair discovery's functions of expediting the administration of justice and guaranteeing the accused adequate information with which to prepare his defense. A scope as liberal as that of the ABA Standards lends itself to misuse too readily. The scope of discovery best suited to the realization of discovery's ends seems to be one in which the defendant may discover items which would probably be of benefit to the preparation of his defense and which are substantially more accessible to the prosecutor than to the defense.

In specific terms, the scope of permissible discovery should include the following: A list of witnesses;[98] statements made by the accused, a codefendant, or a witness, including statements contained in grand jury testimony; records of criminal convictions of any such persons available to the prosecutor; inspection of tangible and documentary evidence; and the reports of experts and results of scientific or medical tests. All of the foregoing are encompassed within the ABA Standards and the Proposed Code of Criminal Procedure's discovery chapter.[99] Additionally, the defendant should be allowed to discover a copy of the police report dealing with the crime with which he is charged. Such reports were probably not discoverable in ordinary circumstances before *Keller*,[100] since they did not represent the statement of a witness but were part of the state's work product.[101] However, disclosure of such reports helps to

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[95]257 Ind. 556, 276 N.E.2d 836 (1972). *See* text accompanying notes 20-23 *supra*.

[96]*See* Note, Keller, *Prosecutorial Discovery and the Privilege Against Self-Incrimination*, 9 IND. L. REV. 623 (1976).

[97]ABA STANDARDS, *supra* note 39, § 1.2.

[98]In Reid v. State, No. 107 S 345 (Ind. Feb. 6, 1978), the supreme court refused to limit "witness" to exclude witnesses expected to be called for rebuttal purposes, and held that a party is entitled to disclosure of rebuttal evidence when the existance and relevance thereof becomes known to the party possessing it.

[99]*See* note 39 *supra*.

[100]In Adams v. State, 254 Ind. 509, 260 N.E.2d 878 (1970), a police officer's notes of an interview with a witness were held not to be subject to disclosure unless the officer testified.

[101]It is not clear whether a "work product privilege" exists in criminal cases under present law. Justice Arterburn dissented in *Sexton* on the grounds that the diagram

maximize the efficiency of the defendant's trial preparation by providing the defense with a background and starting point for its preparations, while constituting a minimal interference with the functioning of the police and prosecutor.

Since it is more conducive to judicial efficiency that certain issues collateral to the defendant's guilt or innocence be raised and resolved before trial, the defendant should be allowed access to sufficient information to determine whether such issues exist.[102] To enable the defense to make a pre-trial suppression motion, the state should be required to disclose whether tangible evidence has been seized, whether any form of identification has been conducted, and whether the defendant or any codefendants have made any statements to law enforcement officials.[103]

The question of discovery privileges is encompassed in the issue of scope. The Proposed Code of Criminal Procedure provided for an "informant" and a "work product" privilege.[104] Present Indiana law recognizes the right of the state to withhold an informant's identity when the state shows a paramount interest in doing so and when the informant's identity is not relevant to any material issue in the case.[105] This rule recognizes the necessity of employing informants in some areas of law enforcement and the danger in mandatory disclosure of informants' names to the defense.[106] A comparable in-

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ordered produced was the state's work product. 257 Ind. at 562, 276 N.E.2d at 840.

Since *Keller* the supreme court has apparently held, without discussion of the term "work product," that the trial court may order the production of police reports. Monserrate v. State, 352 N.E.2d 721 (Ind. 1976).

[102]It might appear that all of these facts would be within the knowledge of the accused; often, however, this is not the case. A search may be conducted while the defendant is already in custody or is absent from the searched premises. A defendant has no way of knowing whether his photograph has been shown to a witness, and many "show-ups" are conducted through one-way windows in holding cells. Aside from these factors, such disclosures are necessary to permit the defense counsel to effectively represent the mistrustful defendant who fails to fully apprise his attorney of the facts known to him, and the confused, intoxicated, or slow-witted defendant who is unable to do so. *See* ABA STANDARDS, *supra* note 39, § 1.2, comment at 41-42.

[103]However, the flexibility with which a suppression hearing can be conducted allows full exploration of the facts relating to the challenged search, confession, or identification at the hearing itself and obviates the need for protracted discovery preparatory to such a hearing.

[104]*See* text accompanying note 42 *supra*.

[105]Dorsey v. State, 254 Ind. 409, 260 N.E.2d 800 (1970); Collett v. State, 338 N.E.2d 286 (Ind. Ct. App. 1975).

[106]Hewitt v. State, 261 Ind. 71, 300 N.E.2d 94 (1973); McCulley v. State, 257 Ind. 135, 272 N.E.2d 613 (1971).

This issue is hedged by constitutional limits. In Roviaro v. United States, 353 U.S. 53 (1957), the United States Supreme Court required disclosure of an informer's identity when such information is "relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause." *Id.* at 60-61. In McCray v. Illinois, 386

former's privilege should be included in any codification of Indiana discovery rules.

The proposed code envisioned a narrower privilege for the work product[107] of the prosecutor and the police than that of Trial Rule 26, which sets forth the standard for discovery of work product in a civil action.[108] While Trial Rule 26 exempts trial preparation in general from disclosure, the proposed code exempts only material containing "opinions, theories, or conclusions" of the prosecutor or police.[109] The concept of "work product" as developed in civil discovery[110] is not particularly useful in criminal procedure. The state has not merely an advantage but a near monopoly of many trial preparation techniques: Fingerprint identification, firearms identification, and many areas of chemical analysis. It is wasteful to require the defendant to duplicate the investigative efforts of the police in these areas, even assuming that the necessary resources are available to him.

The danger to be avoided in this area is that the defendant may abuse discovery procedures by causing unnecessary cost and inconvenience to the law enforcement agency. The state should be required to produce only that evidence which is already in existance; it should not be required to research, investigate, or summarize for the defendant's benefit.[111] These practices are anomalous in an adversary system as they debilitate the fact-resolution process of

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U.S. 300 (1967), the Court upheld an Illinois privilege statute applied to prevent disclosure of an informant's identity at a suppression hearing, where the issue was the validity of a warrant issued upon information obtained from that informant, despite a confrontation clause challenge.

[107]CODE OF CRIMINAL PROCEDURE: PROPOSED FINAL DRAFT, *supra* note 37, § 35-5.1-4-1(d), reads in part: "Disclosure shall not be required of legal research or of records, correspondence, reports or memoranda to the extent that they contain the opinions, theories or conclusions of police officers, the prosecuting attorney or members of his legal staff unless the material exculpates the defendant."

[108]IND. R. TR. P. 26(B)(2) restricts discovery of materials prepared for trial, with the exception of statements by the discovering party, to those for which good cause can be shown for production. Trial Rule 26(B)(3) allows a party to obtain a list of expert witnesses who will appear at trial for his opponent and to discover their relevant opinions. Otherwise, the opinions and information possessed by expert witnesses may not be discovered without a showing of inability to obtain equivalent information without undue hardship.

[109]The privilege found in the Proposed Code of Criminal Procedure is slightly broader than that of the ABA STANDARDS, *supra* note 39, § 2.6(a), as the latter does not include the opinions of police officers.

[110]*See* Hickman v. Taylor, 329 U.S. 495 (1947).

[111]For example, many defense discovery motions request "the substance of any oral statment" made by a witness. If the state summarizes such a statement for the defendant, the defense may then seek to bind the state to its summary, preventing contradiction at trial. This runs counter to the trial's purpose of discovering the truth.

that system and place one party in the position of vouching for another's evidence.

B. Procedure

One of the recurring difficulties with present discovery practice is the confusion engendered by the diversity of local court rules and the lack of definite standards to which such rules must conform. In some reported cases, the defendant's misunderstanding of the trial court's action upon his discovery demand prevented appellate review of the merits of discovery claims.[112] In others, the defendant was held to have waived discovery issues by failing to seek the appropriate remedy in the trial court.[113] This difficulty illustrates the need for definitiveness in the trial court procedure.

There are two general models of discovery procedure, either of which may be utilized by trial courts under *Keller*. The usual procedure, and that envisioned by the pre-*Keller* cases, required the defendant to move the trial court to order the state to provide the discovery sought. In this procedure, the validity and propriety of each request is automatically submitted to the court for determination. In the alternative model, that employed by the Federal Rules of Criminal Procedure[114] and recommended in the standards of the American Bar Association,[115] the defendant requests discovery directly from the state, and only when the parties dispute whether a given disclosure should be made is the court called upon to take action.

Each model has virtues and flaws. The first model discussed above permits the defendant to know with certainty whether his discovery has been granted and injects clarity into the appellate consideration of discovery issues by focusing argument either on the propriety of the trial court's ruling or the sufficiency of the state's compliance. However, the burden placed upon the courts to routinely

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[112]In Dillard v. State, 257 Ind. 282, 274 N.E.2d 387 (1971), the defendant obtained an order requiring the state to list persons questioned during the investigation, but the state responded by producing a witness list. The defendant was held to have waived the issue of the state's incomplete compliance by failing to request sanctions in the trial court.

In Block v. State, 356 N.E.2d 683 (Ind. 1976), and Hendrix v. State, 262 Ind. 309, 315 N.E.2d 701 (1974), the defendants argued that the state had failed to comply with a discovery order when the court found that no order had been issued. A similar waiver occurred in Murphy v. State, 352 N.E.2d 479 (Ind. 1976).

[113]Siblisk v. State, 263 Ind. 651, 336 N.E.2d 650 (1975); Owens v. State, 263 Ind. 487, 333 N.E.2d 745 (1975); Luckett v. State, 259 Ind. 174, 284 N.E.2d 738 (1972); Buchanan v. State, 336 N.E.2d 654 (Ind. Ct. App. 1975) *See also* Ross v. State, 360 N.E.2d 1015 (Ind. Ct. App. 1977).

[114]FED. R. CRIM. P. 16(a).

[115]ABA STANDARDS, *supra* note 39, § 1.4.

rule upon every discovery request made will strain judicial resources unless the action taken upon the motions also becomes routine and automatic. Consideration of seriously contested discovery motions is thus unnecessarily impeded and complicated.

The second model discussed above remedies this fault but tends to prolong the discovery process through the addition of an extra stage in which the prosecutor decides whether to comply or contest. Such added time may be sufficient to constitute a delaying factor that limits the speediness of criminal trials.

Any scheme of discovery procedure must include sanctions for noncompliance. As already noted, present Indiana law relies heavily on the continuance as the principal discovery remedy.[116] Obviously, no number of continuances will compel an unwilling or dilatory opponent to provide ordered or authorized discovery. The continuance is an appropriate remedy when noncompliance is the result of oversight or inability to comply within the available time when it appears that additional time will enable discovery to be completed. An accused should not, however, be required to accept indefinite delay of his trial as the price of discovery. At some point, more powerful sanctions are necessary to prevent willful or bad faith failure to provide discovery. The point at which such sanctions become appropriate is contingent upon too many factors to be governed by rigid rules. The varying degrees of difficulty involved in producing different kinds of evidence, the wide variations in caseloads and manpower among the individual prosecutors' offices and law enforcement agencies throughout the state, and similar considerations suggest that the decision to impose punitive sanctions should be entrusted to the trial court's discretion.[117]

The Indiana Rules may enumerate the acceptable sanctions or may generally direct the trial court to take appropriate action. The Federal Rules, like the Indiana Civil Discovery Rules[118] and existing Indiana discovery case law,[119] permit the court to exclude undis-

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[116]*See* text accompanying notes 65-71 *supra*.

[117]This may be what the Indiana Supreme Court intended to provide in cases such as Lund v. State, 345 N.E.2d 826 (Ind. 1976), which held that discovery sanctions are discretionary with the trial court. Both the American Bar Association and the Indiana Criminal Code Study Commission propose considerable trial court discretion in providing sanctions. ABA STANDARDS, *supra* note 39, § 4.7; CODE OF CRIMINAL PROCEDURE: PROPOSED FINAL DRAFT, *supra* note 37, § 35-5.1-4-6(d). The Federal Rules of Criminal Procedure also vest wide discretion in the trial court. FED. R. CRIM. P. 16(d).

[118]IND. R. TR. P. 37(B)(3).

[119]Keel v. State, 333 N.E.2d 328 (Ind. Ct. App. 1975); State v. Buza, 324 N.E.2d 824 (Ind. Ct. App. 1975). In Olson v. State, 262 Ind. 329, 315 N.E.2d 697 (1974), while the issue was not directly under consideration, the Indiana Supreme Court gave effect to a trial court's ruling striking the testimony of a witness, whose name was omitted from

closed evidence.[120] The American Bar Association's Advisory Committee on Pretrial Proceedings omitted this remedy from its Standards with the following comment:

> Without rejecting this device as a useful sanction in some situations, some members of the Committee thought there would be difficulties in applying it against accused persons, and unfairness if the sanction was applied only against the prosecution. The Committee's general view, moreover, was that the court should seek to apply sanctions which affect the evidence at trial as little as possible, since these standards are designed to implement, not to impede, fair and speedy determinations of cases.[121]

Although the constitutional problems once thought to inhere in exclusion of defense evidence may have dissipated since the United States Supreme Court's decisions in *Williams v. Florida*[122] and *Wardius v. Oregon*,[123] the comments to the ABA Standards pose a valid criticism of evidentiary exclusion as a discovery remedy: It punishes not only the offending party but society as a whole by reducing the validity of the trial as a fact-finding process.

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a witness list, by disregarding the testimony on appeal. *But see* Upshaw v. State, 352 N.E.2d 102 (Ind. Ct. App. 1976).

[120]In French v. State, 362 N.E.2d 834 (Ind. 1977), the trial court struck testimony concerning statements not disclosed to the accused pursuant to a discovery order. The Indiana Supreme Court did not discuss the propriety of this sanction, but proceeded to consider whether the trial court's admonition to the jury to disregard the testimony was sufficient to cure any error in its admission.

[121]ABA STANDARDS, *supra* note 39, comment to § 4.7, at 107-08.

[122]399 U.S. 78 (1970). In *Williams*, the United States Supreme Court upheld a Florida Rule of Criminal Procedure that required the defendant to give notice of his alibi defense and excluded all alibi testimony except that of the defendant himself as the penalty for noncompliance.

[123]412 U.S. 470 (1973). In *Wardius*, the United States Supreme Court overturned an Oregon statute with a similar sanction because the statute did not provide for similar discovery to the defense. The Indiana Supreme Court has also upheld exclusion of alibi testimony as a sanction for noncompliance with the Indiana alibi notice statute (IND. CODE §§ 35-5-1-1 to -3 (1976)). Bowen v. State, 263 Ind. 558, 334 N.E.2d 691 (1975); Lake v. State, 257 Ind. 264, 274 N.E.2d 249 (1971). Justice DeBruler concurred separately in *Bowen* and would hold that insofar as the statute prevents the accused from testifying himself as to his alibi, it contravenes article 1, § 13 of the Indiana Constitution. 263 Ind. at 568, 334 N.E.2d at 697.

Professor Robert Clinton in his article on the "right to defend," criticizes these decisions as infringing upon the accused's right to present a defense. Clinton, *The Right to Present a Defense: An Emerging Constitutional Guarantee in Criminal Trials*, 9 IND. L. REV. 713, 830-41 (1976). This position reflects the curious view that the defendant should be immune from the very procedural rules to which he can hold the state.

A contempt citation issued against the offending counsel is the chief alternative to the exclusion sanction.[124] However, since courts are reluctant to find contempt except in the most extreme cases, it is generally ineffective as a sanction. Furthermore, contempt is often inappropriate in cases where the attorney is not responsible for the noncompliance or is unable to avert it. This may occur when a defense lawyer has difficulty in obtaining cooperation from his client or it may occur as a result of the misunderstandings and frictions that accompany the interaction of prosecutors with prosecuting witnesses and law enforcement agencies. The court should not be limited, however, in using its contempt powers to prevent willful sabotage of discovery processes by parties, counsel, or witnesses.

Although attorney disciplinary procedures may be used as a discovery sanction, the use of such procedures as a sanction is subject to the same limitations that accompany the use of contempt.[125] Furthermore, the exclusion sanction, as opposed to the disciplinary or contempt sanction, penalizes persons other than the attorney, thereby maximizing the incentive of the persons involved in both the defense and prosecution process to cooperate in providing the required discovery.

A final aspect of discovery procedure concerns the protective order.[126] The court should be empowered to defer or restrict discovery, or condition it upon compliance with special rules, in cases where the application of the ordinary rules of discovery would endanger a witness or subject him to harassment, impede an ongoing investigation, endanger the confidentiality of legitimate government secrets, or subject either party to unreasonable expense or inconvenience. The Federal Rules of Criminal Procedure[127] and the Proposed Code of Criminal Procedure[128] contained such a provision, and the ABA Standards recommend one.[129]

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[124]Justice Prentice recommended this sanction in Chatman v. State, 263 Ind. 531, 334 N.E.2d 673 (1975).

[125]The use of attorney disciplinary procedures to enforce discovery rules is suggested by the American Bar Association. ABA STANDARDS, *supra* note 39, comment to § 4.7, at 108.

[126]IND. R. TR. P. 26(C).

[127]FED. R. CRIM. P. 16(d).

[128]CODE OF CRIMINAL PROCEDURE: PROPOSED FINAL DRAFT, *supra* note 37, §§ 35-5.1-4-3 to -6(a).

[129]ABA STANDARDS, *supra* note 39, § 4.4. The ABA Standards also suggest in camera review of materials and excision of nondiscoverable materials. Both are worthwhile devices for dealing with unusual situations.

C. Specific Forms of Discovery

The forms of criminal discovery that have developed under existing case law have already been described.[130] *Antrobus* predicted the adoption of the "techniques" of civil discovery into criminal procedure;[131] and several techniques, the deposition and the motion to produce in particular, have been so adopted. The deposition in criminal cases has come to mirror the deposition in civil cases.[132] The motion to produce is a broader device in criminal procedure than in civil procedure; it has become the all-purpose discovery vehicle, which has been used to discover items as diverse as witness lists and expert's reports.[133] Also, the court's power to order the defendant to submit to physical tests, examinations, and measurements resembles the Trial Rule 35 order for physical or mental examination.[134]

The question must invariably arise whether the major remaining civil discovery device, the interrogatory, should be employed in criminal proceedings. This issue did not arise until 1976,[135] when the Indiana Court of Appeals decided *Gutowski v. State*.[136] Gutowski filed written interrogatories with the trial court to be answered by the

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[130]*See* text accompanying notes 12-35 & 54-57 *supra*.

[131]253 Ind. at 423, 254 N.E.2d at 874.

[132]*See* text accompanying notes 72-76 *supra*.

[133]State *ex rel.* Keller v. Criminal Court, 262 Ind. 420, 423, 317 N.E.2d 433, 435 (1974).

[134]IND. R. TR. P. 35(A). There is a rule based upon the statute rendering accomplices competent witnesses, IND. CODE § 35-1-31-3 (1976), and the general competency of witnesses statute, *id.* § 34-1-14-5, that permits defendants to require accomplice witnesses to submit to psychological examinations for the purpose of determining whether the witness is competent to testify under § 34-1-14-5, which requires that witnesses be sane at the time they testify. Antrobus v. State, 253 Ind. 420, 254 N.E.2d 873 (1970). A similar rule applies to the prosecutrix in a rape prosecution. Wedmore v. State, 237 Ind. 212, 143 N.E.2d 649 (1957). The trial court has discretion in determining whether a psychiatric examination is necessary. Chadwick v. State, 362 N.E.2d 483 (Ind. 1977).

[135]A 1973 Indiana Supreme Court decision, Fender v. Lash, 261 Ind. 373, 304 N.E.2d 209 (1973), appears to suggest that interrogatories may be employed in criminal prosecutions. In that case, the petitioner, an inmate of the state prison, filed a petition for a writ of habeas corpus, which the trial court treated as a post-conviction relief petition. Although the opinion does not so specify, the petioner sought to obtain leave of the trial court in the post-conviction preceeding to serve interrogatories on the state. Brief for Petitioner at 17-18. The trial court struck the motion; and the supreme court affirmed, holding that Indiana Trial Rule 33(A) allows service of interrogatories on the opposing party without leave of court. 261 Ind. at 376, 304 N.E.2d at 210. The rules governing post-conviction proceedings expressly provide that civil discovery rules apply. IND. R. POST-CONVICTION RELIEF 1, § 5. The court also remarked about the lack of a *Dillard* foundation; under the circumstances this comment seems unnecessary, since Trial Rule 33 does not require any such foundation.

[136]354 N.E.2d 293 (Ind. Ct. App. 1976).

complaining witness. The trial court sustained the state's objection that Trial Rule 33 allows interrogatories to be served only on parties.[137] Judge Staton, for the court, wrote:

> Nor do we intend to imply that the technique of discovery by interrogatories submitted to a complaining witness is improper in a criminal case. The trial court has the inherent power to apply the techniques of discovery embodied in the civil rules and is not bound by the limiting language contained in those civil rules. In the proper case, discovery by written interrogatories served on non-parties may well be appropriate as a less coumbersome [sic] and less expensive technique than discovery by depositions.[138]

The court held, however, that Gutowski had waived the issue by failing to argue the propriety of his particular interrogatories at a hearing in the trial court for that purpose. Gutowski's argument that the interrogatories were actually a deposition upon written questions under Trial Rule 31 was disposed of in the same manner.[139]

Judge Garrard concurred separately, stating that he would hold that interrogatories may not be served on a non-party.[140] He identified a reason for not allowing the use of interrogatories to non-parties that applies to their use with parties as well:

> While use of interrogatories may normally be the most inexpensive discovery technique, they are usually of questionable value in adducing the depths of shading necessary to the resolution of disputed factual issues. As stated by Dean Harvey, ". . . interrogatories . . . constitute a cumbersome device not suitable for complicated factual situations or where parties may prove evasive."[141]

This is probably due to the distinctive function of interrogatories, which were developed as a feature of the pleadings of suits in

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[137]IND. R. TR. P. 33(A) provides: "Any party may serve upon any other party written interrogatories to be answered by the party served . . . ."

[138]354 N.E.2d at 296.

[139]The court assumed that the criminal procedure deposition statute, IND. CODE § 35-1-31-8 (1976), allowed such depositions. However, the Indiana Supreme Court had already decided, in Murphy v. State, 352 N.E.2d 479 (Ind. 1976), that the statute had been superseded, *see* the text accompanying notes 74-76 *supra*, and that Trial Rules 30 & 31 applied to the taking of depositions. Written depositions are expressly permitted under Trial Rule 31 but differ in form from interrogatories.

[140]354 N.E.2d at 300 (Garrard, J., concurring). *See also* Hampton v. State, 359 N.E.2d 276, 279 (Ind. Ct. App. 1977) (Staton, P.J., concurring in result).

[141]354 N.E.2d at 300 (Garrard, J., concurring) (quoting 2 W. HARVEY, INDIANA PRACTICE 682 (1970)).

equity[142] to narrow the issues in the case for trial.[143] For this reason, interrogatories are appropriate to determine the opinions, conclusions, and contentions of parties.[144] This function is necessary under notice pleading but is fulfilled by the pleadings themselves in criminal procedure.[145] Although inexpensive and convenient when compared with depositions, interrogatories are seldom employed as a complete discovery device but rather as a preparation for those devices capable of more detailed fact resolution. Interrogatories are one reason why civil litigation involves the consumption of more time and money than criminal litigation. Moreover, while the accused's right against self-incrimination does not protect him from being required to disclose his defenses and witnesses,[146] it may well protect him from being required to answer interrogatories.[147] Interrogatories would thus be a discovery device available only to defendants.

There are no reported Indiana cases dealing with the applicability of the remaining civil discovery device, the Trial Rule 36 request for admissions, to criminal prosecutions. The purpose of this device has been described as being the elimination of the need of proving facts not seriously contested.[148] This is a worthwhile objective, consonant with the discovery purpose of procedural efficiency, but the device itself is poorly suited to the practicalities of criminal procedure. The rule deems the requested matter admitted unless the answering party denies it within thirty days.[149] Since defendants are seldom required by the nature of any defense to prove peripheral or uncontroverted facts, the device fails in its purpose with respect to the defense. However, it can be abused by the defendant who requests the state to admit the lack of a necessary element of the offense in hopes that the state will inadvertently fail to answer. The sanction for bad-faith denial is the assessment of costs under Trial Rule 37(B).[150] This sanction is unlikely to deter either the state or

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[142]E. MERWIN, EQUITY AND EQUITY PLEADING § 915, at 521 (1895).

[143]8 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2163, at 487 (1970); 2 W. HARVEY, INDIANA PRACTICE 684 (1970).

[144]2 W. HARVEY, INDIANA PRACTICE 684 (1970).

[145]*See* notes 84 & 85 *supra* and accompanying text.

[146]State *ex rel.* Keller v. Criminal Court, 262 Ind. 420, 317 N.E.2d 433 (1974).

[147]In State *ex rel.* Land v. Knox Superior Court, 249 Ind. 471, 233 N.E.2d 233 (1968), the taking of depositions by the defendant was held not to constitute a waiver of the defendant's privilege against self-incrimination. The state could depose the defendant's witnesses but not the defendant himself.

[148]3 W. HARVEY, INDIANA PRACTICE 58-59 (1970).

[149]IND. R. TR. P. 36(A).

[150]3 W. HARVEY, INDIANA PRACTICE 61 (1970).

the defendant. Furthermore, its benefits may be realized by stipulations by the parties.[151]

A final discovery device worth consideration is the bill of particulars.[152] The bill of particulars is a vestige of the generally abandoned system of refining fact issues through pleadings; it is a statement by the prosecutor of specific details of the offense charged. In a reasonably liberal scheme of discovery such as Indiana's, a device for disclosure of factual details of the charge would unnecessarily duplicate other discovery devices. Production of police reports would provide equivalent information with less inconvenience to either party. In situations in which relevant facts would not appear in the official reports, such as entrapment cases, the bill is likely to suffer the same inadequacy as the interrogatory—insufficient factual sensitivity. Deposition of the state's witnesses would be more likely to reveal necessary information.

There are, however, two uses of the bill of particulars that have prospective merit. One is to replace the anachronistic statutory procedure for giving notice of alibi evidence.[153] The statute, enacted to allow the prosecution an opportunity to detect spurious alibis,[154] requires the accused to notify the prosecution of the place he intends to prove that he was at the time of the offense as a precondition to the admissibility of the alibi evidence.[155] There appears to be no justification for singling out alibi evidence and subjecting it to special disclosure standards when the state can discover defenses and defense witnesses in general. Moreover, the statute permits the defendant to require the state to specify the time and place of the offense *after* he has notified the state of his whereabouts.[156] The remedy for noncompliance is again exclusion of evidence, in this case

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[151]Existing statutory law provides for pre-trial conferences in criminal cases at which the court and parties are to consider "the simplification of the issues to be tried at trial and the possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof." IND. CODE § 35-4.1-3-1(b) (1976). Following the conference, the trial court is to file a memorandum of the agreed matters. *Id.* § 35-4.1-3-1(c).

[152]*See* text accompanying note 86 *supra*. The bill of particulars envisioned by the Proposed Code of Criminal Procedure allowed the defense to request any "items of factual information . . . which relate to the charge and are not recited in the indictment or affidavit." CODE OF CRIMINAL PROCEDURE: PROPOSED FINAL DRAFT, *supra* note 37, § 35-3.1-1-3(a). The bill was to be granted when "the court is satisfied that any or all of the items of information requested in the motion . . . are necessary to enable the defendant adequately to prepare or conduct his defense." *Id.* § 35-3.1-1-3(b).

[153]IND. CODE §§ 35-5-1-1 to -3 (1976). *See* text accompanying notes 4-6 *supra*.

[154]Note, *Criminal Law: Statutory Regulation of Alibi Defense Through Notice Requirements*, 30 IND. L.J. 106, 107-08 (1954).

[155]IND. CODE § 35-5-1-3 (1976). The statute allows the trial court to excuse noncompliance for good cause.

[156]*Id.* § 35-5-1-2.

evidence that the accused was at the scene of the offense.[157] This provision is a trap for the careless prosecutor.

The bill of particulars could be used to enable the defendant to obtain a precise statement of the time and place of the offense in order to prepare his alibi defense. The state could discover this defense and the identity of the alibi witnesses through ordinary discovery techniques. Thus, the disclosure of alibi matters would be brought into uniformity with the remainder of discovery law, and the anomalies of the current statutory procedure ended.[158]

Also there are cases in which the accused cannot ascertain the exact offense with which he is charged because the statute defining the offense sets out elements in the alternative, and the charging instrument alleges all of the elements.[159] While an early case held that an indictment sufficiently vague to warrant a bill of particulars

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[157]*Id.* § 35-5-1-3. *But see* Owens v. State, 263 Ind. 487, 333 N.E.2d 745 (1975).

[158]Indiana appears to be the only jurisdiction employing a procedure in which the accused states his alleged whereabouts *and then* demands to know where and when the crime is alleged to have been committed. IND. CODE § 35-5-1-1 (1976). *See Statutory Regulation of Alibi Defense Through Notice Requirements, supra* note 154, at 109. The federal alibi notice rule calls for the government to demand notice from the defendant, specifying the time and place of the offense. FED. R. CRIM. P. 12.1.

[159]The problem can be illustrated both under the recently repealed criminal code and the newly enacted code. The former kidnapping statute, IND. CODE § 35-1-55-1 (1976) (repealed 1977), defined kidnapping as: (1) forcibly carrying away, (2) fraudulently carrying away or decoying, or (3) imprisoning with the intention to carry away. In Davis v. State, 355 N.E.2d 836 (Ind. 1977), the information alleged that the accused both forcibly *and* fraudulently carried away his victim.

Under the repealed code, the problem also arose in other offenses, *i.e.*, the robbery statute, IND. CODE § 35-13-4-6 (1976) (repealed 1977) (taking "by violence or by putting in fear"); first degree murder, *id.* § 35-13-4-1 (1976) (repealed 1977) (premeditated and felony murder).

Under the present law, in effect since Oct. 1, 1977, there remain numerous offenses possessing alternative elements or sets of elements. *See, e.g., id.* § 35-42-3-1 (Supp. 1977) (kidnapping); *id.* 35-42-4-1 (rape); *id.* § 35-42-4-2 (unlawful deviate conduct); *id.* § 35-42-1-1 (arson); *id.* § 35-43-1-2 (mischief); *id.* § 35-43-2-2 (trespass). In most cases, these formulations are more clearly expressed than were the element formulations of prior law; alternative elements are generally set out in separately numbered subsections. *Compare id.* § 35-1-124-2 (1976) (repealed 1977), *with id.* § 35-43-5-2 (Supp. 1977) (forgery).

Hopefully, this clarification of elements will lead prosecutors to charge offenses without duplication of elements and will ameliorate the conditions which the bill of particulars is meant to remedy. The linguistic conservatism of those who draft indictments and informations, however, is a force not be to underestimated, *see* Candler v. State, 363 N.E.2d 1233, 1236-38 (Ind. 1977), and established formulations and phrases may remain in use notwithstanding the simple clarity with which the Criminal Code defines offenses.

could be quashed,[160] it is unclear whether this holding survives more recent cases declining to void charges for surplusage.[161]

The bill of particulars could be useful in disclosing the state's theory, at least insofar as specifying the elements of the offense charged and the basis of liability.[162] Such use might conserve time and effort by preventing needless litigation over the sufficiency of the charging instruments.[163]

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[160]Sherrick v. State, 167 Ind. 345, 79 N.E. 193 (1906). *See* text accompanying note 86 *supra*.

[161]*See, e.g.*, Candler v. State, 363 N.E.2d 1233 (Ind. 1977).

[162]The accessory before the fact statute, IND. CODE § 35-1-29-1 (1976), allows the defendant to be charged as a principal but convicted as an accessory.

[163]The federal courts disagree as to whether FED. R. CRIM. P. 7(f), which provides for bills of particulars, permits courts to require the government to state legal theories. *See* C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE—CRIMINAL § 129, at 287 n.49 (1969). Clearly such a requirement can lead the parties astray into premature and immaterial legal argument over unripened issues. This should be controlled by the trial court by restricting the use of the bill to those cases where necessary to provide adequate information to prepare a defense.

Comment

Some Observations Regarding Crime Control

*Andrew Jacobs, Sr.**

This is a commentary upon three aspects of the criminal justice system. Part one will suggest the proper role of the system in dealing with the criminal. Part two will probe some evidentiary defects in the present system and their effects on criminal justice. Finally, part three will point out and explore the inconsistencies and other shortcomings of the Indiana change-of-venue and change-of-judge laws.

I. What Should Be Done With Criminals?

Generally, there are two schools of thought regarding methods of crime control: Behavioral change through psychotherapy or other means of persuasion, and punitive deterrence. The "change" group leans toward the doctrine of "determinism," which alleges that a person is birth-launched as a guided missile and turned toward, or away from, crime as his genetic structure or environment—mostly the latter—impels him. The "punitive" group ascribes to all persons (save the insane) a free will or choice; that is, each person is accountable for his conduct, and punishment for crime tends to compel lawful choices. There are vast tomes advocating each doctrine, or a mix of both;[1] but which doctrine, punitive deterrence or gentle persuasion, is the most effective?

At the risk of falling victim to simplistic nonsense,[2] it is submitted that laws are made to be obeyed and enforced when necessary. The quaint belief that enforcement consists of detecting, prosecuting, and punishing criminals is not invalidated by its ancient lineage. Not to be overlooked is Indiana's constitutional mandate for a penal code "founded upon the principles of reformation and not

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[1]For those desiring to pursue the subject further, I recommend three works: H. Packer, The Limits of the Criminal Sanction (1968); J. Wilson, Thinking About Crime (1975); and S. Yochelson & S. Samenow, The Criminal Personality (1976-1977). Each presents extensive bibliographical notes from which one can find enough reading for a lifetime.

[2]*See* Germann, *Criminal Justice Leadership*: Bankrupt Forever? 15 Criminology 3, 5 (1977), where the author, in an editorial comment on the ineffectiveness of the present criminal justice system, characterizes as "simplistic nonsense" the criminal justice solutions that are "programmed neatly: more, better-armed, better-equipped police; tougher judges and harsher sentenses; larger and more punitive detentions."

vindictive justice."[3] However, note that this constitutional provision recognizes the value of "penal" laws. It does not proscribe society's right of self-defense, nor does it belie the fact that criminal abstention is, in some measure, effected by punishment and the threat thereof.

Reformation is most likely with so-called "first offenders," who are usually, in truth, "first caught." If the first offender is amenable to reform, a moderate sentence will suffice. This is because of the frightful experience of being first imprisoned. Even though he may have committed other crimes, the crucial point is this first distressing penalty, which is apt to cause the criminal to resolve to avoid a life of crime. Experience indicates that recidivism is less among young criminals who have suffered such a distressing imprisonment than among those who are placed on probation.[4] Therefore, a moderate sentence is most often best for the first offender, or "first caught," as well as for society. However, such is not the only consideration from the viewpoint of protecting society. The youthful criminal probationer is considered "turned loose by the judge." All of his peers have the same concept and will fear the law less and be more apt to begin or continue criminal activity. Probationers thus become, even unconsciously, a silent recruiting agent for the criminal culture.

Evidence indicates that society's greatest protection comes from the isolation of criminals, thereby suspending their criminal con-

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[3]IND. CONST. art. 1, § 18.

[4]J. WILSON, *supra* note 1, at 168.

Professor Robert Martinson, of New York City College, writes: "What kind of a science is criminology when, after half a century of research, it cannot decide whether the reported recidivism rate is one-third or two-thirds?" CORRECTIONS MAGAZINE, Dec. 1976, at 57. Martinson demonstrated the validity of his observations by use of coded computer cards. He discovered an average recidivism rate of 23.5%, which is a much lower percentage than past studies have indicated. *Id.* (FBI statistics reflect recidivism rates, within three years of release for the crimes mentioned, as follows: Burglary, 76%; robbery, 70%; auto theft, 68%; rape, 64%; murder, 63%; theft of property, 61%; forgery, 60%; assault, 60%; narcotics, 57%; larceny, 55%; weapons, 55%, fraud, 54%; gambling, 40%; embezzlement, 22%; and all others, 54%. [1974] U.S. DEP'T JUST., FBI, UNIFORM CRIME REPS. 51.)

Like this writer, Professor Martinson does not know what the true recidivism rate is, but we all know that it is too high and that what we have done in recent years —at least until the last two years—has not produced favorable results. Recent improvements are still not enough.

Bear in mind that all recidivism rates are based upon later crimes for which the convict has been caught. Presently, we will see that not more than one of five *reported crimes* is "cleared," *see* note 10 *infra* and accompanying text, which means detection of the perpetrator with adequate evidence to bring him to trial. To this confusion add the respectable evidence that only one of every four serious crimes is reported. *See* note 8 *infra* and accompanying text. Of course, the situation would be worse were it not for the present efforts exerted by the system.

duct.[5] For this reason, habitual criminals should be incarcerated for life. Harsh? Yes! Yet if it reduces crime, as experience teaches, the future will witness fewer people harshly treated, victims as well as criminals. The former are harshly, often cruelly, treated. A stern policy is calculated to reduce human suffering. In the long run, it is more apt to reform the early offender, inhibit the tempted, and immobilize the habitual criminal. Under the realities of life, a stern policy is the most humane policy. Let those who recoil from "locking up a human being like an animal" bear in mind that each of us makes our own passport to freedom or prison. Furthermore, even now, we would imprison fewer than we are apt to think at first blush. Repeaters probably commit a vast majority of serious crimes. Too often we are prone to think there is a different criminal for each crime. Careful investigations confirm that some criminals commit thousands of unsolved crimes.[6]

The FBI's *1974 Uniform Crime Reports* stated that an estimated 10.1 million serious crimes were committed within the United States during that year.[7] However, a Census Bureau survey discovered that in 1974 only one of every four victims had reported the crime.[8] From their sampling, the Census Bureau estimated that there were not merely 10.1 million but 39.6 million serious crimes committed in the United States during 1974.[9] The FBI's report also estimated that there had been a 21% clearance rate of reported crimes in 1974 based upon their reported figures;[10] therefore, if the Census Bureau's findings are accurate, only 5.2% of all crimes were cleared. The failure is largely in what we do, or usually do not do, with the convicted criminal, especially the repeater. Sight must not be lost of the fact that locking up the "once caught" criminal will cancel many future crimes.

Regarding probation, one should never say "never." It is estimated that some states put as many as 70% of their convicted felons on probation.[11] The figure in Indiana is 58%.[12] In the federal system, it is more than 45%.[13] In my judgment and experience, no

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[5]J. WILSON, *supra* note 1 at 162-82, 198-202. *See also*, J. PETERSILIA, P. GREENWOOD, & M. LAVIN, CRIMINAL CAREERS OF HABITUAL FELONS 121 (1977).

[6]*See* 1 S. YOCHELSON & S. SAMENOW, *supra* note 1, at 221-26. *Cf.* J. PETERSILIA, P. GREENWOOD, & M. LAVIN, *supra* note 15, at 115-16 (many criminals commit an average of 20 crimes per year).

[7][1974] U.S. DEP'T JUST., FBI, UNIFORM CRIME REPS. 10.

[8]Los Angeles Times, May 24, 1976, § 1, p.13, col. 1.

[9]*Id.*

[10][1974] U.S. DEP'T JUST., FBI. UNIFORM CRIME REPS. 42.

[11]Wilson, *U.S. Prison Population Sets Another Record*, CORRECTIONS MAGAZINE, Mar. 1977, at 5.

[12][1976-1977] IND. DEP'T CORR., DIV. PROB., ANN. REP. 3.

[13][1976] DIR. AD. OFF. U.S. COURTS, ANN. REP. 368-69.

more than 2% of convicts qualify for probation. Admittedly, this is a subjective judgment, yet it seems indisputable that probation is excessively used. Of those placed on probation, 48% are caught in other crimes within three years.[14] Some will claim that this reflects a substantial degree of public protection. Not so. It does not account for those among the remaining 52% who commit crimes and are not caught. In this context, it is pure folly to ignore the truth, which is plain, and to lack the fortitude to deal harshly with harsh people.

The 58% of the convicted felons who emerge from our Indiana courts scot-free do so because judges are persuaded that the criminal behavior of people can be altered by the gentle persuasion of a probation officer. The greatest experts confess they do not know how to accomplish this desirable end.[15] There is a powerful desire to believe in such a cure, but until evidence warrants reliance, we would be wise not to be misled by our fervent hope. Impractical romanticism will not reduce crime; stern law enforcement will, as it is now doing: "Reports of serious crime in the United States fell seven percent during the first six months of 1977, when compared with the same period of 1976 . . . . The downward trend in serious crime first appeared in the last quarter of 1976 . . . ."[16] Taking the mean figure of 10 million serious crimes per year, the 7% reduction means 700,000 fewer annual crimes in the United States. In addition, prisoners in all state and federal prisons increased from 218,466 at the outset of 1975 to 242,750 at the beginning of 1976, and

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[14][1974] U.S. DEP'T JUST., FBI. UNIFORM CRIME REPS. 52.

[15]In *The Criminal Personality*, the authors quote Dr. Hervey M. Cleckley, as follows:

> Having regularly failed in my own efforts to help [psychopaths] alter their fundamental pattern of inadequacy and antisocial activity I hoped for a while that treatment by others would be more successful. I have now, after more than two decades, had the opportunity to observe a considerable number of patients who were kept under treatment not only for many months but for years. The therapeutic failure in all such patients observed leads me to feel that we do not, at present, have any kind of psychotherapy that can be relied upon to change the psychopath fundamentally.

1 S. YOCHELSON & S. SAMENOW, *supra* note 1, at 484.

The authors devoted much space to this theme. They concluded, however, by claiming to have discovered a reliable method of behavioral change. Their proposals do not appear to be different than past efforts and proposals of others, nor do they appear, for that matter, likely to be more effective. After fifteen years of practical research and effort, they claim only thirteen cases of "changed criminals" as of May 1976. *Id.* at 436. On November 12, 1977, Samenow addressed a seminar of the Indiana Lawyers Commission and the Indiana University School of Medicine. When asked to give the number of criminals successfully treated by him, he stated that there were nine, a reduction of almost one-third over an 18-month period when an increase would have been expected to result.

[16]Press release by Attorney General Griffin B. Bell (Oct. 12, 1977).

increased again to 283,145 at the beginning of 1977.[17] This is an increase of 64,679 persons imprisoned over the two-year period. Taken together, these facts indicate 10.82 fewer crimes per increase of one prisoner, and 43.28 fewer if the reduced ratio holds under the census figures that indicated 3 of every 4 serious crimes were not being reported. This relief should increase once the message is heard loud and clear throughout the land. An added benefit could very well be an increased respect for law and order, which would serve as a strategic inhibiter of crime.

We have strained our resources in a vain attempt to effectively use gentle persuasion upon ungentle people. The unvarnished truth is that Indiana law prescribes adequate criminal sanctions. However, the General Assembly proceeds to construct numerous escape hatches, such as the Criminal Sexual Deviancy Act,[18] the Drug Abuse Act,[19] and the probation laws.[20] It is then argued, with evangelistic fervor, that the courts must open these escape hatches because the law "so allows." The judge who does not respond favorably is condemned for "refusing to follow the law."

When we gird ourselves for the unpleasant task and let it be known that *all criminals* must pay their penalty, crime rates will continue to go down, even more rapidly. We are still quite addicted to the "good ole boy" probation syndrome. Crime is still a cancerous growth on our society. The limited relief here noted simply indicates that the malignancy does respond to the strong medicine herein suggested.

II. Some Evidentiary Defects

The legal profession proclaims that a trial is a search for the truth. Usually this is true. However, under some judge-made evidentiary rules, letting the truth creep into the record is reversible error. Evidentiary rules designed to establish the truth should be adopted and followed. Those calculated to shut out the truth or confuse the fact-finding process should be abandoned. Following are two examples of the former and one of the latter.

A. The Exclusionary Rule

The exclusionary rule holds that if officers violate a defendant's rights against unreasonable search, no evidence thereby discovered

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[17]National Criminal Justice Information and Statistical Service, U.S. Department of Justice, Prisoners in State and Federal Institutions on December 31, 1975, at 16 (1976); *id.*, Prisoners in State and Federal Institutions on December 31, 1976, Advance Report at 1 (1977).

[18]Ind. Code §§ 35-11-3.1-1 to -37 (1976) (amended 1977).

[19]*Id.* §§ 16-13-6.1-1 to -34.

[20]*Id.* §§ 35-7-1-1 to -5-12.

may be used against the defendant. In 1914, the United States Supreme Court held that if such evidence could be used, "the Fourth Amendment . . . might as well be stricken from the Constitution."[21] By this rescript, the Court proclaimed that the exclusionary rule was the only possible remedy for an unreasonable search. That assertion was then untrue and still is.

In 1968, the Indiana Court of Appeals held that one could recover for damages sustained from violation of his civil rights.[22] The decision held that the city, county, or state was liable for such damages caused by their officers. This is an alternative remedy for violation of a defendant's rights against unreasonable search. Furthermore, it is a fair one. It holds each party responsible for his own wrongdoing. It does not free known criminals on a theory that two unredressed wrongs equal justice.

The exclusionary rule has a checkered career and an inglorious history. During prohibition, bootleggers rolled in money and hired the best legal talent who then "sold" their legal sophistry to pliant judges who, in turn, enshrined the exclusionary rule in our "temples of justice." The rule blossomed into an impenetrable hedge of protection for those affluent criminals. It then stood sentinel for less wealthy scofflaws because the sacrament could not be defiled and then reused in big-fee cases.

Today this specious rule most often protects the human flotsam that deal in drugs and narcotics. In its inglorious history, it has never protected an innocent defendant. It has, on the other hand, freed untold thousands of persons known to be guilty. Those who worship this doctrine, and profit by it, claim the damage remedy would be inadequate because, they say, if the aggrieved person were guilty, a jury would award him little or no damages. Quite so, I hope. That is how the scales of justice should balance. The damage rule would protect the innocent person wrongfully set upon by the police; the exclusionary rule turns away the innocent with indifference while yielding tender loving care for the scofflaw. That is not how the scales of justice should balance.

In 1926, Justice Cardozo issued the following warning: "The criminal is to go free because the constable has blundered . . . . A room is searched, against the law, and the body of a murdered man is found . . . . The privacy of the home has been infringed, and the murderer goes free."[23] Forty-seven years later, Justice Cardozo's prophecy came true in Indiana, when the exclusionary rule freed a murderer.[24] Three armed robbers engaged deputy sheriffs in a shoot-

[21]Weeks v. United States, 232 U.S. 383, 393 (1914).

[22]Brinkman v. City of Indianapolis, 141 Ind. App. 662, 231 N.E.2d 169 (1967).

[23]People v. Defore, 242 N.Y. 13, 23-24, 150 N.E. 585, 587-88 (1926).

[24]Adams v. State, 260 Ind. 663, 299 N.E.2d 834 (1973) (3-2 decision).

out. One deputy was killed and one robber was wounded by the slain deputy's shots. Under authority of a search warrant, bullet fragments were removed and used in evidence to prove the defendant's presence at the scene. The Indiana Supreme Court reversed, holding that the murderer's constitutional rights had been violated by unreasonable search, hence the bullets could not be lawfully used as evidence. The defendant went free. The deputy was still dead.

Chief Justice Givan and Justice Prentice dissented, but only to hold that the search was reasonable. The majority held the search was unreasonable, warrant or no warrant. The whole court upheld the discredited rule. So, Indiana balanced this safe extraction of bullet fragments with bringing a murderer to justice and read the scales in favor of the criminal.

Lest you think this is merely an aberration of mine, let me quote from other opinions. In 1954, the United States Supreme Court stated in *Irvine v. California*:[25] "It [the exclusionary rule] protects one against whom incriminating evidence is discovered, but does nothing to protect innocent persons who are the victims of illegal but fruitless searches."[26] In 1971, Justice Harlan wrote in a concurring opinion to *Bivens v. Six Unknown Federal Narcotics Agents*:[27] "[A]ssuming innocence of the crime charged, the 'exclusionary rule' is simply irrelevant. For people in Bivens' shoes it is damages or nothing."[28]

In *Bivens*, the Supreme Court recognized, as did the Indiana Court of Appeals, that one has an inherent damage action for a civil rights violation. However, unlike Indiana, which abolished state sovereign immunity, the United States Supreme Court did not abolish federal sovereign immunity. Hence, it recognized the remedy but left intact an insurmountable barrier, as well as the discredited exclusionary rule. Chief Justice Burger agreed in principle with the majority opinion in *Bivens*. Nevertheless, he dissented from the Court's holding, "which judicially [created] a damage remedy not provided for by the Constitution and not enacted by Congress."[29] The Chief Justice overlooked the fact that the exclusionary rule was judicially created. He did, however, write a powerful argument against the exclusionary rule and urged Congress to fashion a new damage remedy in its stead.[30]

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[25]347 U.S. 128 (1954).

[26]*Id.* at 136.

[27]403 U.S. 388 (1971).

[28]*Id.* at 410 (Harlan, J., concurring).

[29]*Id.* at 411 (Burger, C.J., dissenting).

[30]In July 1975, considering the foregoing, I set up a test case by holding that the rule had been superseded in Indiana by the damage remedy. The order denying applicability of the exclusionary rule was supported by a nine-page memorandum opinion.

Despite all of this condemnation, the exclusionary rule is still intact and performing its traditional function of freeing known criminals. This rule is virtually devoid of friends save criminals and most of their lawyers. It deserves a judicial burial.[31]

B. The Fruit of the Poisonous Tree

The *Miranda*[32] rule requires authorities to advise in-custody suspects of their constitutional right to remain silent plus other related rights. Failure to properly advise precludes the use in court of anything the suspect might say. The "poisonous fruit" exclusionary rule is a branch of the *Miranda* rule that was developed to preclude any evidence discovered by following investigative leads gleaned from what the suspect said. Such evidence is scorned as "the fruit of the poisonous tree."

An Indiana Supreme Court decision furnished a graphic example of these rules. In *Dowlut v. State*,[33] police questioned a murder suspect in violation of his *Miranda* rights. He confessed and led police to a remote spot where the murder gun was unearthed. This case is an excellent example of the validity of the *Miranda* rule and the folly of the "poisonous fruit" rule. The logical and just reasons for excluding improperly procured confessions are their unreliability and their almost conclusive effect upon juries. For example, police had told the murder suspect that his father might be charged with the murder. Thus, the confession, given under such stress, was unreliable without corroboration. No fair court would admit such a confession into evidence. However, the corroboration in this case was so powerful as to render it reliable enough for jury consideration. The suspect's knowledge of where the murder weapon was hidden was conclusive proof that he had knowledge of the murder. In

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State v. Wilson, No. CR74-112 C (Ind., Marion Cr. Ct., July 29, 1975), *rev'd*, No. 2-1075 A 302 (Ind. Ct. App., Dec. 22, 1976). The Indiana Court of Appeals reversed with an unpublished memorandum opinion that totally ignored the questions raised in the trial court opinion. State v. Wilson, No. 2-1075 A 302 (Ind. Ct. App., Dec. 22, 1976). The Indiana Supreme Court denied transfer without opinion.

[31]This rule was created by the courts. As stated in my opinion in State v. Wilson, No. CR74-112 C (Ind., Marion Cr. Ct., July 29, 1975), *rev'd*, No. 2-1075 A 302 (Ind. Ct. App., Dec. 22, 1976):

> I hold that the judiciary should correct its own errors to the end that we can cope with [drugs] and other evils. I simply hold that given the respectable company with which this ruling is associated I cannot share the reverence which has, in some quarters, raised the exclusionary rule to the level of a political sacrament.

[32]Miranda v. Arizona, 384 U.S. 436 (1966).

[33]250 Ind. 86, 235 N.E.2d 173 (1968).

the absence of any explanation of innocent knowledge, the inference of guilt was next to inescapable.

The trial judge admitted the evidence. On appeal the Indiana Supreme Court reversed, holding that the corroborative evidence was the "poisoned fruit" of the unlawfully obtained confession.[34] Criticism is due the United States Supreme Court rather than the Indiana Supreme Court, however, because under the former's decision in *Watts v. Indiana*,[35] the Indiana Supreme Court had no choice but to decide as it did.

Nevertheless, a weak shaft of light has dawned over the United States Supreme Court. This was manifested in the recent Supreme Court decision in *Brewer v. Williams*.[36] A murder defendant was driven by police back to the jurisdiction of the crime. Defense counsel and the police agreed that the latter would not question the defendant during the drive. During the journey, an officer who knew the accused to be deeply religious bemoaned the fact that the whereabouts of the little girl's body were unknown, that it was Christmas, and that her parents should be enabled to give their little ten-year-old daughter a decent Christian burial. The accused then led the police to the little girl's hidden remains.

The trial court admitted the evidence of the finding of the body. The Supreme Court held the admission to be reversible error. In his dissenting opinion, the Chief Justice stated:

> The result of this case ought to be intolerable in any society which purports to call itself an organized society. It continues the Court—by the narrowest margin—on the much criticized course of punishing the public for the mistakes and misdeeds of law enforcement officers, instead of punishing the officer directly, if in fact he is guilty of wrongdoing. It mechanically and blindly keeps reliable evidence from juries whether the claimed constitutional violation involves gross misconduct or honest human error.
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> Today's holding fulfills Justice Cardozo's grim prophecy that some day some court might carry the exclusionary rule to the absurd extent that its operative effect would exclude evidence relating to the body of a murder victim because of

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[34]*Id.* at 92, 235 N.E.2d at 177 (citing Watts v. State, 229 Ind. 80, 95 N.E.2d 570 (1950)).

[35]338 U.S. 49, *rev'g*, 226 Ind. 655, 82 N.E.2d 846 (1949). Final decision: Watts v. State, 229 Ind. 80, 95 N.E.2d 570 (1950).

[36]431 U.S. 925 (1977) (5-4 decision). Justices Stewart, Brennan, Marshall, Powell and Stevens voted for the reversal. Chief Justice Burger, Justices White, Blackmun and Rehnquist dissented.

> the means by which it was found. In so ruling the Court regresses to playing a grisly game of "hide and seek," *once more exalting the sporting theory of criminal justice* which has been experiencing a decline in our jurisprudence. . . . Apart from a brief comment on the merits, however, I wish to focus on the irrationality of applying the increasingly discredited exclusionary rule to this case.[37]

C. Confusing the Fact-Finding Process With Unsupported Issues

The Chief Justice of the United States Supreme Court complained above of "once more exalting the sporting theory of criminal justice." In recent years, Indiana's trial courts and the Indiana Court of Appeals have shown criminals their spirit of judicial sportsmanship. They have held that the jury must be told it can convict upon a lesser crime despite the total lack of evidence to warrant a finding that it was the lesser crime that was committed.

In the act of committing certain crimes, the criminal automatically commits other crimes. For example, to commit murder in the act of robbery one automatically commits robbery or attempted robbery. In committing armed robbery, one commits simple robbery, theft from the person, theft (of $100 or less, or over $100, with each category prescribing different penalties), assault, and perhaps battery. The Indiana Supreme Court has clearly ruled in *Hester v. State*[38] and *Hash v. State*[39] that, absent any evidence that the lesser crime was committed rather than the crime charged, the trial court was not required to instruct the jury that it could find guilt upon any lesser-included crime. In short, the accused was guilty of the crime charged or he was innocent.

There were Indiana trial and appellate court judges who overlooked the supreme court's rulings and viewed a trial, as Chief Justice Burger noted, with a spirit of sportsmanship. So it became a rather common practice to instruct the jury that it could find guilt on lesser offenses regardless of the complete lack of evidence warranting such a verdict. This gave the accused a sporting chance of getting off with a lighter penalty.

In the 324 jury trials over which I presided, the juries were instructed according to the rule promulgated by the Indiana Supreme Court. Lawyers were righteously indignant. They apparently believed they had acquired the sporting chance due to the common practice

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[37] *Id.* at 932 (Burger, C.J., dissenting) (emphasis added).

[38] 262 Ind. 284, 315 N.E.2d 351 (1974).

[39] 258 Ind. 692, 284 N.E.2d 770 (1972).

of ignoring the supreme court's holding. So appeal followed appeal. Most, being from judgments of ten years or less, were appealed to the Indiana Court of Appeals, whence came reversal after reversal. Of these, only *Arbuckle v. State*[40] is here cited. Arbuckle was charged with and convicted of armed robbery. There was no evidence that the crime was any less than plain armed robbery. The court of appeals reversed because the trial court had not told the jury it could find against the clear and undisputed evidence and thereby find the defendant guilty of a lesser included offense.

Nine days later, the Indiana Supreme Court affirmed my judgment of a twenty-year sentence in *Harris v. State*,[41] another armed robbery case. Reversal was urged because of my refusal to instruct the jury that it might find the defendant guilty of the lesser offenses of robbery (while unarmed), assault with intent to commit a felony, theft, assault and battery, and assault. The total evidence was that the defendant held up the victim with a gun. Stated otherwise, there was no evidence that any element of armed robbery was absent. The defendant was either guilty of armed robbery or he was innocent. In this decision, the supreme court again laid down the *Hash* and *Hester* rule so plainly that "he who runs could read."

Presumably, that sporting program has now become "inoperaative." At least it should be, but do not count on it at the trial level. Trial judges who refuse to continue this sporting aspect of criminal trials will be ordered off the bench by criminals, as the supreme court has held they have the absolute right to do without any cause whatever.[42]

III. How Venue Laws Affect Justice

A. Stonewalling the Issue

Our venue laws are "anachronistic and unique to Indiana. Their daily abuse is the most serious impediment to the administration of justice in Indiana today." So wrote Justice Hunter in *State ex rel. Benjamin v. Criminal Court.*[43] He did not exaggerate. Indiana's venue statutes and supreme court venue rules constitute a conglomeration of incongruities genuflecting to a thinly disguised professional chauvinism. Space permits but a few examples. These examples will amply prove Justice Hunter's statement.

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[40]366 N.E.2d 200 (Ind. Ct. App. 1977).

[41]366 N.E.2d 186 (Ind. 1977).

[42]*See* notes 75-97 *supra* and accompanying text.

[43]341 N.E.2d 495, 498 (Ind. 1976) (consolidated appeal of State v. Benjamin, No. CR75-472 C (Ind., Marion Cr. Ct., April 2, 1976) and State v. Green, No. CR75-421 C (Ind., Marion Cr. Ct., Dec. 24, 1975)).

In any civil case, even a one dollar civil case not triable by jury, a change of county must be granted upon mere demand without assigning any ground.[44] In no non-capital criminal case can a change of county be granted unless sufficient grounds are proven.[45] In any case, civil or criminal, a change of judge must be granted upon demand with no grounds required.[46] These simple truths instantly provoke two questions: Why any change without grounds?, and why greater protection for a one dollar bill than for a person facing prison?

During 1976, these questions were vainly presented to the Indiana Supreme Court in quest of a solution. First to discuss the issues were *State v. Benjamin*[47] and *State v. Green*[48]—both will be more fully discussed below.[49] In its February 11, 1976, decision, which consolidated the appeals of these two cases, the Indiana Supreme Court acknowledged the "quite persuasive arguments" that the criminal change-of-judge rule should be modified.[50] The opinion then stated: "This matter has been referred to the rules committee of this court where it will be thoroughly studied and reconsidered."[51]

Indiana Trial Rule 80 prescribed a preliminary study by the supreme court's rules committee and required that the committee's recommendations be submitted to the court *and be made public* by July 1, 1976.[52] This date passed without any known, formal reports by the committee. Trial Rule 80 further prescribes: "The committee *or the court* shall accept for consideration suggestions with reference to the proposed rules or other rules during the ensuing month [July]."[53]

On July 29, 1976, the Criminal Court of Marion County, in general term, petitioned the supreme court to modify the criminal change-of-judge rule. This petition was submitted to the supreme court, not to the rules committee. By its own rule, the supreme court was required to act upon this petition by November 1, 1976. It did not and to this day has not.

On August 4, 1976, six days after the general term petition was filed, Chief Justice Givan wrote a letter to the four Marion County

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[44]IND. R. TR. P. 76.
[45]IND. R. CR. P. 12.
[46]*Id.*; IND. R. TR. P. 76.
[47]No. CR75-472 C (Ind., Marion Cr. Ct., Apr. 2, 1976).
[48]No. CR75-421 C (Ind., Marion Cr. Ct., Dec. 24, 1975).
[49]*See* notes 80 & 81 *infra* and accompanying text.
[50]State *ex rel.* Benjamin v. Criminal Court, 341 N.E.2d 495,497 (Ind. 1976).
[51]*Id.*
[52]IND. R. TR. P. 80.
[53]*Id.* (emphasis added).

Criminal Court judges. In it he stated: "The members of this Court, while not in total accord, are aware of the abuses of the present rule and recognize its inherent deficiencies. Nevertheless, we have heretofore been convinced that a change such as you have recommended would do more harm than good."[54] The letter then described one feared "harm": "Among the considerations that trouble some members are the 'substantive v. procedural' issue and the propriety, both constitutionally and as a matter of policy, of denying the change to defendants in criminal actions while granting it to civil litigants."[55] Thusly, the Justices raised a valid and unresolved question of great enormity. It was the constitutionality and fairness of affording greater protection to a one dollar bill than to personal liberty. Overlooked was their change-of-county rules, which do exactly that. This oversight was quickly brought to their attention.

Octavius Demon Engram, an armed robbery defendant facing up to thirty years in prison, demanded a change of county. His written demand admitted that he could not show cause under the criminal rule. He asserted that he had a constitutional right, as well as a right based upon concepts of fundamental fairness, to as much protection as the supreme court prescribed in civil cases.[56] I denied the motion for reasons stated in a memorandum opinion, which concluded: "I favor even handed justice, not even handed injustice or folly."[57]

Engram's attorneys petitioned the supreme court to mandate the change. They urged the same argument the Chief Justice had urged against modifying the criminal change-of-judge rule. I agreed with the petitioners to the extent that the disparity was indefensible but urged that it be eliminated by requiring cause for any change of county or judge. The supreme court simply denied the writ, without opinion, and left their own question "twisting slowly in the wind," where it still hangs.

The justices will again be confronted with the same question. Engram was convicted and has appealed, assigning the denial of the writ as the alleged error.[58] The implications are enormous. If the supreme court eliminates the disparity by prescribing no-cause change of county, as in civil cases, there will be a flood tide of criminal cases venued. This excess will be inspired by the fat fees

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[54]Letter from Chief Justice Richard M. Givan to the Marion County Criminal Court Judges (Aug. 4, 1976).

[55]*Id.*

[56]Brief for Appellant at 5, State v. Engram, No. 2-677 A 242 (Ind. Ct. App., filed Oct. 4, 1977).

[57]Memorandum Opinion Denying Motion to Correct Errors at 2, State v. Engram, No. CR76-279 B (Ind., Marion Cr. Ct., Mar. 29, 1977).

[58]State v. Engram, No. 2-677 A 242 (Ind. Ct. App., filed Oct. 4, 1977).

loaded upon urban counties by the courts in the smaller venue counties. For example, take two cases venued from Marion County. The first went to the Superior Court of Hamilton County. That court appointed public defenders and allowed them fees of $24,541.37, which were billed to and paid by Marion County.[59] The second case was first venued to the Superior Court of Hancock County thence revenued to the Wayne Circuit Court.[60] The private attorney representing the two defendants in the case had petitioned the Hancock court to withdraw from the defense of one of the two defendants, asserting that he had been paid nothing by that defendant but had been "fully paid" by the other. This was granted. After the case reached Wayne County, the same lawyer petitioned the Wayne court to withdraw from the defense of the remaining defendant, asserting that he had not been "fully paid." This petition was granted, and the same lawyer was instantly appointed as a public defender to defend the same defendant. He was later allowed a $5,000 fee. The total public defenders' fee billed to Marion County was $17,047.07. This appears to be a quite profitable practice.

Perhaps the reluctance to equalize the civil and criminal change-of-county rules by also allowing groundless changes in criminal cases stems from discretion being the better part of valor, or perhaps we should say, greed. To open the floodgates in criminal cases might kill the goose that laid these golden eggs. To equalize the rules by requiring grounds for changes of county in civil actions would raise a "furor," as we will presently see. There are subtle ways of protecting these high fees from the judgment of the original judge. The original judge has some responsibility to the taxpayers of the original county. It is they who must pay the bills. Nevertheless, the venue judges assume the authority to fix these fees despite the fact that the law specifically prescribes that the amount of the fees for such public defenders appointed by the venue courts "shall be settled and allowed by the judge of the court from which the change of venue was first granted."[61] This statute was not repealed by a later act of the General Assembly as some of the interested parties have contended.[62] This is but one phase of the thinly disguised professional chauvinism mentioned above.

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[59]State v. Banks, No. SCR73-012 (Ind., Hamilton Super. Ct., Jan. 16, 1975).

[60]State v. Statz, No. CR74-117 B (Ind., Marion Cr. Ct., change of venue granted July 8, 1974), renumbered No. SCR-626 (Ind., Hancock Super. Ct., change of venue granted Mar. 12, 1975), renumbered No. 308-CR (Ind., Wayne Cir. Ct., June 18, 1975).

[61]IND. CODE § 35-1-25-13 (1976).

[62]Ch. 169, § 216, 1905 Ind. Acts 631 (presently codified at IND. CODE § 35-1-25-13 (1976)), was not repealed by ch. 210, § 1, 1913 Ind. Acts 612 (presently codified IND. CODE § 34-2-15-1 (1976)). Knox County Council v. State *ex rel.* McCormick, 217 Ind. 493, 514, 29 N.E.2d 405, 414 (1940).

B. Jurisdiction of the Supreme Court or the General Assembly

Chief Justice Givan's letter also posed the question of whether jurisdiction to modify the requirements for changes of venue was with the supreme court or with the Indiana General Assembly. As we will see, the question is presently moot in civil cases because the General Assembly and the supreme court have both mandated groundless changes of venue. The following discussion is useful in disclosing how the court has ignored the questions Chief Justice Givan raised.

Even as the Chief Justice Givan posed the question, the court had already prescribed the grounds for changes of venue—that is to say, no grounds are needed, except for county changes in criminal cases. In 1969, the General Assembly had ceded procedural jurisdiction to the supreme court,[63] and had repealed all of its existing procedural statutes.[64] This "repealer" was incorporated in the supreme court's order establishing its new rules of procedure in 1969.[65] Significantly, the "repealer" did not repeal the statutes prescribing grounds for changes of judge or county.[66] In its rules, the court, in turn, did not prescribe any grounds for changes. In Trial Rule 76, it merely provided for changes "[i]n all cases where the venue of a civil action may now be changed from the judge or the county," and prescribed as the proper procedure "an unverified application or motion."[67] However, this very procedure made a dead letter of all the unrepealed "grounds" statutes by the simple provision in Trial Rule 76 that "an unverified application or motion" for change of judge or county "shall be granted . . . without specifically stating the ground therefor."[68]

Since 1881, an Indiana statute has prescribed grounds for changes of judge or county in civil cases.[69] A requested change of judge is mandatory upon filing an affidavit averring one or more of the following: (1) The judge has been counsel in the case, (2) is kin to a party, (3) is a witness in the case, or (4) is guilty of bias or prejudice of interest.[70] The same Act prescribes three grounds for a change of county, which is mandatory upon filing an affidavit aver-

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[63]Ch. 191, § 2, 1969 Ind. Acts 715 (presently codified at IND. CODE § 34-5-2-1 (1976)).

[64]*Id.* § 3 (presently codified at IND. CODE § 34-5-2-2 (1976)).

[65]Supreme Court of Indiana Order Adopting Rules (July 29, 1969), *reprinted in* IND. CODE Court Rules, Book 1 at xxxii (Burns 1973).

[66]IND. CODE §§ 34-1-13-1 to -5 (1976) (originally enacted as ch. 38, § 255, 1881 Ind. Acts (Spec. Sess.) 285).

[67]IND. R. TR. P. 76.

[68]*Id.*

[69]IND. CODE § 34-1-13-1 (1976) (originally enacted as ch. 38, § 255, 1881 Ind. Acts (Spec. Sess.) 285).

[70]*Id.*

ring one or more of the following: (1) The opponent's undue influence or local prejudice against the movant, (2) the county is a party, or (3) the convenience of witnesses.[71]

Thus, Trial Rule 76 merely substituted "an unverified application or motion" for the statute's required affidavit. However, both proclaim, in effect, the mandate that the requested change be granted. Left unresolved is the separation-of-powers issue: that is, who is competent to modify rights to a change—the court by rule or the General Assembly by statute? As a legal and perhaps a constitutional question, the justices should at least resolve the two serious questions Chief Justice Givan has posed.

C. Do Present Laws and Rules Really Mandate Groundless Changes of Judge in Criminal Actions?

The answer to the above question depends upon which statutes remain in force, the interpretation of those that are, and the interpretation of Criminal Rule 12.

The same disparity between civil and criminal change of county has been the law since 1852.[72] The present separate statutes prescribing criminal and civil changes of judge were enacted in 1881.[73] The civil statute is clearly mandatory. The criminal statute itself was not, and is not, clearly mandatory. It was the 1925 decision in *Barber v. State*,[74] which held the following language from the criminal statute to be mandatory:

> The defendant may *show to the court*, by affidavit, that he believes he cannot have a fair trial, owing to the bias and prejudice of the judge against him, or the excitement or prejudice against the defendant in the county or in some part thereof, and demand to be tried by disinterested triers.[75]

The word "show" means: "To make apparent or clear by evidence; to prove (or) to reasonably satisfy."[76]

In *State v. Benjamin*[77] and *State v. Green*,[78] I interpreted the criminal statute to require evidence of facts susceptible of creating a

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[71] *Id.*

[72] *See* ch. 1, § 207, 2 IND. REV. STAT. 74 (1852) (civil change of venue) (current version at IND. CODE § 34-1-13-1 (1976)); ch. 1, §§ 75-78, 2 IND. REV. STAT. 370-71 (1852) (repealed 1881) (criminal change of venue) (current version at IND. CODE §§ 35-2-1-1 to -6 (1976)).

[73] *See* ch. 38, § 225, 1881 Ind. Acts. (Spec. Sess.) 285 (current version at IND. CODE § 34-1-13-1 (1976)); ch. 36, §§ 194-195, 1881 Ind. Acts. (Spec. Sess.) 151 (current version at IND. CODE §§ 35-2-1-1 to -6 (1976)).

[74] 197 Ind. 88, 149 N.E. 896 (1925).

[75] IND. CODE § 35-1-25-1 (1976) (emphasis added).

[76] BLACK'S LAW DICTIONARY 1549 (4th ed. 1951).

[77] No. CR75-472 C (Ind., Marion Cr. Ct., April 2, 1976).

[78] No. CR75-421 C (Ind., Marion Cr. Ct., Dec. 24, 1975).

belief of bias and prejudice. Note that the statute does not require proof of bias and prejudice. It requires a showing that the defendant believes the judge is biased. It is common sense and fair that one should not have to worry at his trial that the judge has it in for him. The statutes do not provide for a change of judge because a civil party or a criminal defendant disagrees with the judge's rulings, hence his views of the law; and the supreme court has so held.[79]

I followed this principle in both *Benjamin* and *Green*. Both defendants were complete strangers to me. With Benjamin present in open court, I told his attorney: "If you can show me any basis upon which this defendant has grounds to believe the Presiding Judge is biased or prejudiced against him I will grant your change and I will give you the opportunity to present any such evidence." Benjamin refused to offer evidence. His motion was overruled. He later wrote in his brief that he "would accept drug abuse treatment in this case if in fact he were to be otherwise eligible under the law," and that he knew I would not agree to that.[80] He was correct, because he was charged with first degree burglary, which carried a sentence of ten to twenty years,[81] and he was therefore ineligible for any kind of probation.[82]

In *Green*, the defendent stated why she wanted a change of judge as follows: "Because of my record and because of the fact that I hear that he doesn't give continuances nor probation nor suspended sentences." The supreme court ordered that she be given the change. She then "granted" herself a permanent continuance by absconding.

Both Benjamin and Green successfully petitioned the supreme court to order me to grant their demands.[83] The supreme court was confronted with traditional liberality in changes of judge. Yet the challenge I created was not precipitous. My court had become virtually paralyzed by wholesale changes. It was pretty common knowledge that most changes were demanded for the same reasons given by Benjamin and Green, plus objections to prompt trials.

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[79]Day v. State, 207 Ind. 273, 192 N.E. 433 (1934); Hays v. Morgan, 87 Ind. 231 (1882).

[80]Relator's Supp. Brief for Writ of Mandamus at 4-5, State v. Benjamin, No. CR75-472 C (Ind., Marion Cr. Ct., April 2, 1976).

[81]IND. CODE § 35-13-4-4 (1976) (repealed 1977).

[82]*Id.* §§ 35-7-1-1, 16-13-6.1-2, -16 (amended 1976). I later granted his change under order of the supreme court. He must have done his time by magic calendar. Eight months later he was back in court charged with the new crime of assault and battery with intent to rob. State v. Benjamin, No. CR76-437 B (Ind., Marion Cr. Ct., filed Dec. 28, 1976).

[83]State *ex rel.* Benjamin v. Criminal Court, 341 N.E.2d 495 (Ind. 1976) (consolidated appeal of *Benjamin* and *Green*).

Chief Justice Givan had discussed the problem with me several times. He was sympathetic and as helpful as possible in view of past precedents. Finally, I told him that I was "of a mind to deny" some demands and to seek a reconsideration of the precedents. He assured me that if I did, such matter would be given careful consideration.

I had some reason for hope. In 1974, the supreme court had modification under consideration. The outcry was so great that the project was aborted. The Chief Justice so told us at the November 1974 meeting of the Indiana Judges Association; and the chairman of the court's rules committee publicly confirmed all of this, stating that the 1974 movement "met such a furor of opposition that the proposal was dropped."[84] I suspect the same "furor" renewed itself while *Benjamin* was pending in 1976.

Be that as it may, the supreme court's opinion in *State ex rel. Benjamin v. Criminal Court*[85] did not discuss the merits of the case presented. The court did refer the matter to its rules committee for study and reconsideration—the equivalent of appointing criminal lawyers as special judges to try each others' cases (which I never did). At any rate, no one ever saw a report from the rules committee; or heard where it met, if it did; or learned who it heard, if anybody. Certainly, Chief Justice Givans' letter of August 4, 1976,[86] indicated that the matter had not been studied and reconsidered sufficiently for resolution of the issues he raised. Yet, all this was minor compared with how the legal question was shunted.

The supreme court's opinion asserted: "In oral presentation to this Court, the respondent conceded the . . . fact that even under the prior statute no evidentiary hearing concerning bias and prejudice was anticipated before the trial judge."[87] This is simply untrue. I was the respondent. In my brief, I quoted the statute and stated:

> We believe the statute meant the changes should be granted upon the defendant's belief that the judge is baised.
>
> But it is in the order of life that beliefs are based upon something which is subject to objective proof. Upon a showing of any fact or facts susceptible of producing such belief the change should be granted.
>
> . . . .
>
> But this does not mean he is entitled to enter trial believing

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[84]Indianapolis Star, Jan. 19, 1977, at 5, col. 5.

[85]341 N.E.2d 495 (Ind. 1976) (consolidated appeal of *Benjamin* and *Green*).

[86]*See* pp. 414-15 *supra*.

[87]341 N.E.2d at 497.

> the judge will turn him loose, despite his guilt, hence that he has a right to shop for a different forum and better odds.[88]

At the oral presentation, this position was clearly understood by the justices. As proof, and to illustrate, Justice Prentice asked me what I would think of a rule requiring the trial judge to accept as true the allegation of fact or facts giving rise to the defendant's claim that he believed the judge to be biased. I replied that I thought such would suffice if the allegations were under oath; that such would then be the same as in the case of purging of criminal contempt; and that the sworn statement, being taken as true, would present a pure question of law as to the sufficiency of the facts sworn—the affiant being, however, liable for perjury if he swore falsely.

The prime, and almost only, argument urged in favor of the present groundless change of judge rule was voiced by Justice Arterburn: "I don't think a judge ought to have the right to decide if he is prejudiced."[89] Obviously, Justice Arterburn did not comprehend the issues presented in *Benjamin* and *Green*. Nor, except for Justice Hunter, do any of the justices who were then serving appear to see the irony of the present rules, which prescribe that the "biased judge" nominate the one who takes his place to try the case.[90] Under the rule, the groundless change is available for only ten days after arraignment.[91] Beginning on the eleventh day, the judge does decide if the defendant is entitled to the change. What magic made the judge fair and competent at the stroke of midnight ending the tenth day?

Also, under my suggested interpretation of the statute, the judge would only decide if some fact were susceptible of causing the defendant to believe that the judge was biased. The judge would not decide if he was or was not biased, or even whether the defendant really believed he was; he would only decide whether the defendant had sworn to facts giving him reason to be fearful that the judge was biased.

Finally, bear in mind that abuses are admitted even by the justices. It is their responsibility to devise a fair rule and to eliminate these abuses. Of course when the rule is absolute, they are relieved of any duty to pass upon any controversy in this regard. If the justices were willing to assume this responsibility, they could fashion a fair and viable rule. Other states and the federal courts

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[88]Brief for Respondent at 5, State *ex rel.* Benjamin v. Criminal Court, 341 N.E.2d 495 (Ind. 1976).

[89]Indianapolis News, May 14, 1977, at 15, col. 5.

[90]IND. R. CR. P. 12.

[91]*Id.*; IND. R. CR. P. 13.

have done so. A rule could prescribe that another judge pass upon the law question—that is, whether the facts alleged were susceptible of causing a defendant to believe that the judge was biased. The supreme court would ultimately review any denial in light of an appeal record that would reflect whether or not the judge had been fair. There must be a fair balance. There are some judges who are pretty bad. Most judges are dedicated. The supreme court has the authority, hence the duty and responsibility, to decide which is which when a judge is challenged. Instead of doing so, they have delegated this authority to the criminals, among others.

The supreme court's Code of Judicial Conduct defines every conceivable cause for which a judge should be disqualified. It is a good Code. The court has the authority and the duty to enforce it. In bad cases, it does so.[92] However, acting only in bad cases is the easy course. Where there is a will there is a way. I do not question the desires of the justices to be fair. I do question their willingness to face up to the opponents of modification and to the extra work that would be required in reviewing denials of demands for changes of judge.

Under the present rules, it is impossible for a criminal judge to conduct court in the proper way. To the criminal, the good judge is the bad judge; so the criminal judge who forces prompt trials and metes out sure punishment to the guilty will be divested of his office by leave of the Indiana Supreme Court. Of course a judge can always trim back and make himself tolerable to criminals and their lawyers, and this can be an almost unconscious reaction.[93]

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[92]*See e.g.*, *In re* Terry, 360 N.E.2d 1004 (Ind. 1977); *In re* Evrard, 333 N.E.2d 765 (Ind. 1975); *In re* Littell, 260 Ind. 187, 294 N.E.2d 126 (1973).

[93]I firmly believe, as a matter of abiding principle, that no judge should preside in any case where he has an interest. However, be assured that the supreme court will not carry this principle to extremes. Thirty-two days after its decision in State *ex rel.* Benjamin v. Criminal Court, 341 N.E.2d 495 (Ind. 1976), the supreme court decided the "Touch-Tone-Phone" case. State *ex rel.* Indianapolis—Marion County Bldg. Auth. v. Superior Court, 344 N.E.2d 61 (Ind. 1976).

A trial judge "adjudicated" that the court's dial phones were too coarse for his liking and ordered touch-tone phones installed by fiscal authorities, who promptly asked for a change of judge. There was, and is, a statute prescribing that any such fiscal officers, in precisely this kind of case, "[are] entitled to a change of venue from the judge," IND. CODE § 34-5-1-1 (1976), and in such case, the supreme court shall name a special judge who lives at least two counties removed. The aesthetic trial judge declared this statute unconstitutional, denied the change, and threatened to toss his opponents into the local bastille. They applied for a writ of mandate, precisely as was done in State v. Benjamin and State v. Green; but the results were quite different. The supreme court held that the statute was not *totally* unconstitutional; but that it was unconstitutional if applied to a case like this, where all the poor trial judge had ordered were basic necessities, such as touch-tone-phones. Only time, and further test cases, can seal the fate of other basic necessities, such as spittoons and wigs.

Defendants Benjamin and Green were total strangers to the judge, who could not

D. We Are Strictly Bound By Our Rules—In Most Cases, That Is.

The *State ex rel. Benjamin v. Criminal Court*[94] opinion states: "The Supreme Court, in adjudicating any particular case, must determine the rights of the parties as they appear under the existing statutes, rules and case law of this state."[95] The opinion then stated that modification of existing law must be done under regular procedures and concluded: "Such a change, however, must operate prospectively and not retroactively."[96]

The rule for amending the supreme court's rules prescribes a calendar schedule.[97] The rules committee must submit its proposed amendments only once a year—on or before July 1. Others may then submit proposed amendments during July. The general term petition was filed on July 29, 1976, in accordance with this time schedule.[98] The amendment rule further prescribes that the court "adapt the rules with such modifications as it determines to be proper on or before November first. Such rules as adopted shall become effective on January 1 of the following year unless the court, in the rule, orders otherwise."[99] The amendment rule further prescribes that: "[E]xcept in cases of emergencies, as otherwise directed by the Supreme Court," the foregoing procedure and time schedule shall govern.[100]

I was aware of this rule when I decided *State v. Benjamin*[101] and *State v. Green*.[102] It was not mentioned when I discussed a possible test case with Chief Justice Givan. In the context of the problem, a delay in effective date until January 1, 1977, would have mattered but little, and it was rather insignificant whether any modified rule applied to *Benjamin* or *Green* or, for that matter, to any pending case. The objective, as the justices knew, was to obtain eventual relief from the abuses admitted in the *Benjamin* opinion, in Chief Justice Givan's letter,[103] and from those so graphically described by Justice Hunter.[104] The direct challenge also presented a concrete

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have had a personal interest in the outcome. Besides, their cases were triable by jury. In the Touch-Tone-Phone case, the judge decided his own case; it was not triable by jury. The justices are dead set against a judge deciding his own case—in some cases, that is.

[94]341 N.E.2d 495 (Ind. 1976).

[95]*Id.* at 497.

[96]*Id.*

[97]IND. R. TR. P. 80.

[98]*See* p. 414, *supra.*

[99]IND. R. TR. P. 80.

[100]*Id.*

[101]No. CR75-472 C (Ind., Marion Cr. Ct., April 2, 1976).

[102]No. CR75-421 C (Ind., Marion Cr. Ct., Dec. 24, 1975).

[103]*See* note 59 *supra* and accompanying text.

[104]*See* note 45 *supra* and accompanying text.

case clearly proving the enormity of these abuses. Finally, it put the matter of correcting the rule before the justices[105] and avoided the futile exercise of appealing to the rules committee. I knew from experience that the court could, and had, ordered modification of venue rules in mid-year and mid-case with retroactive effect.

Early in 1972, I was appointed special judge by the Honorable John L. Niblack, Judge of the Marion Circuit Court, in what was known as the Airport case.[106] On May 8, 1972, I overruled a Motion for Change of Venue from Marion County. This ruling was correct under Trial Rule 76(6) as it existed on that day. The very next day the supreme court made an order that put into effect, retroactively as of March 28, 1972, an amendment to Trial Rule 76(6). This amendment required me to vacate my denial and grant the change of county, which I did.

This question assaults one's mind: Why was the court able to act overnight in regard to Trial Rule 76(6) and yet has not been able to act in two years in regard to the admitted abuses in Criminal Rule 12? After all, the supreme court's opinion in *State ex rel. Benjamin v. Criminal Court*[107] stated: "The respondent then proceeded to argue, quite persuasively, that the rule should be changed." This was in January 1976. Yet, after this lapse of time, the court has not addressed itself to the admitted abuses of Criminal Rule 12; nor has it addressed itself to its amazing prescriptions whereby it affords greater change of county protection to a one dollar bill than it does to one facing life imprisonment—a question Chief Justice Givan himself raised. Instead, as we will now see, the court has drawn the noose tighter on the trial courts.

This was done in *State ex rel. Barlow v. Marion Criminal Court.*[108] Had my ruling in this case been affirmed, it would have afforded no real relief from Criminal Rule 12. My ruling was simply that Criminal Rule 12 required the defendant to personally sign his demand for change of judge. This problem had come to my attention when a defendant appearing before me disclaimed his attorney's signed request for a change of judge.[109] It was after this that I made the ruling in question. The ruling was correct. The supreme court,

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[105]The supreme court does overrule some of its earlier decisions. Generally, such rulings do have retroactive effect. Essentially, I was asking the court to overrule Barber v. State, 197 Ind. 88, 149 N.E. 896 (1925). *See* note 77 *supra* and accompanying text.

[106]Merchant's Nat'l Bank & Trust Co. v. Indianapolis Airport Auth., No. C72-26 (Ind., Marion Cir. Ct., change of venue granted May 17, 1972); renumbered No. C72-137 (Ind., Boone Cir. Ct., Jan. 7, 1974).

[107]341 N.E.2d 495, 497 (Ind. 1976).

[108]361 N.E.2d 1206 (Ind. 1977).

[109]State v. Hutcherson, No. CR76-272 C (Ind., Marion Cr. Ct., Feb. 25, 1977).

however, ordered that the changes be granted, holding that Criminal Rule 12 did not require the moving defendant to personally sign the motion. Justice Hunter dissented. The majority, even as it so ordered, conceded: "Repondent's interpretation of [Criminal Rule 12] is not unreasonable, but is nonetheless erroneous."[110]

My interpretation depended upon several factors. Prior to the adoption of the supreme court's rules, in both civil and criminal actions, the moving party was required to sign, in person, any affidavit for a change of judge.[111] The supreme court's opinion concedes this was the law prior to the adoption of the rules. When the court adopted its rules, it expressly provided that in civil actions the unverified application could be signed "by a party or his attorney."[112] In criminal actions, the court prescribed: "In all cases where the venue of a criminal action may now be changed from the judge, such change shall be granted *upon the execution* and filing of an unverified application therefor by the State of Indiana or *by the defendant.*"[113] The criminal rule clearly prescribes execution by the defendant. The affirmative change of prior law in civil cases, and omission of such change in criminal cases, was quite convincing, and I think conclusive:

> It has been held that what is expressed is exclusive only when it is creative, or in derogation of some existing law, or of some provision in a particular act, and it has been stated that the maxim properly applies only when in the natural association of ideas in the mind of the reader that which is expressed is so set over by way of strong contrast to that which is omitted that the contrast enforces the affirmative inference that that which is omitted must be intended to have opposite an contrary treatment.[114]

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[110]361 N.E.2d at 1207.

[111]McHargue v. State, 193 Ind. 204, 139 N.E. 316 (1923) (criminal); Fidelity & Cas. Co. v. Carroll, 186 Ind. 633, 117 N.E. 852 (1917) (civil).

[112]IND. R. TR. P. 76(1).

[113]IND. R. CR. P. 12.

[114]26 IND. L. ENCYCLOPEDIA *Statutes* § 119 (1960).

A statute for a drug abuse program was interpreted (by the court of appeals) regarding eligibility for the program. The court of appeals stated:

> When a limitation is imposed in a particular instance, the limitation will not be read into other statements in which it is not specifically provided. . . .
>
> The legislature did limit the types of crime which would give rise to ineligibility with respect to subsections (a) and (c). We must therefore assume that the same limitation would have been made in subsection (d) if it had been intended.

Trabue v. State, 328 N.E.2d 743, 744 (Ind. Ct. App. 1975).

It follows that when an exception (*e.g.*, allowing counsel to sign) is prescribed in one rule and omitted in the second rule, it should be assumed that the same exception would have been made in the second rule if it had been so intended.

The superficial significance of this decision is the contrast with the court's rescript in *State ex rel. Benjamin v. Criminal Court*[115] that it could not amend its rules retroactively. In this case, it did. The court, in order to mandate me to rule for the defendants, had to rationalize the alteration of the plain language of its rule in a specific case, in mid-year, and with retroactive effect. That is precisely what it said it could not do, despite its having literally done so before in the 1972 Airport case.[116] Furthermore, it again literally did so in late 1977.[117]

The further significance of *Barlow* is that it constituted an epilogue conclusively proving that the supreme court would grant no relief from the "anachronistic" venue rules. This refusal is at odds with the court's recent notable service in establishing other needed reforms. For example, the court approved an excellent and comprehensive criminal discovery procedure.[118] This was the greatest and most beneficial criminal procedure reform during the statehood of Indiana. The court has also overruled some truth-suppressing precedents;[119] approved sensible procedures for calling, organizing, and managing regular jury panels;[120] and approved jury instructions in plain and understandable language.[121]

The court's willingness to improve these problems, and others not mentioned here, but not its venue rules, warrants a belief that it has yielded to pressures from the bench and bar. Of course, no one knows what percentage of the bench and bar favors modification, although we know many do. The Indiana State Bar Association is a bit bashful about an open discussion or debate upon the issue. Some if its members and one of its high officials, who are members of the General Assembly, have blocked any hearing or vote on the issue. All of these members are very vocal. I suspect the supreme court and General Assembly may be like the farmer who contracted to

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[115]341 N.E.2d 495 (Ind. 1976).

[116]*See* note 110 *supra* and accompanying text.

[117]*See* Davis v. State, 368 N.E.2d 1149 (Ind. 1977); Logal v. Cruse, 368 N.E.2d 235 (Ind. 1977).

[118]*See* State *ex rel.* Keller v. Criminal Court, 317 N.E.2d 433 (Ind. 1974).

[119]*See* Sharp v. State, 369 N.E.2d 408 (Ind. 1977); McGowan v. State, 366 N.E.2d 1164 (Ind. 1977); Patterson v. State, 324 N.E.2d 482 (Ind. 1975).

[120]*See* Holt v. State, 365 N.E.2d 1209 (Ind. 1977); Brown v. State, 360 N.E.2d 830 (Ind. 1977); Johnson v. State, 362 N.E.2d 1185 (Ind. Ct. App. 1977).

[121]*See* Holt v. State, 365 N.E.2d 1209 (Ind. 1977); Brown v. State, 360 N.E.2d 830 (Ind. 1977); Johnson v. State, 362 N.E.2d 1185 (Ind. Ct. App. 1977).

furnish a restaurant a million frog legs from his horse pond. When he fell down on his contract he explained: "I was evidently mislead by the noise."

IV. SUMMARY

Though inadequate, only punitive deterrence affords any real measure of crime control. It is folly to reject it in favor of theories disproven in practice. A firm commitment to consistently punish crime will breed, not only fear of, but respect for the law. Pride in a law abiding life has declined during, and due to, our recent tolerance for crime. Alexander Pope, in *An Essay on Man*, put this succinctly:

> Vice is a monstor of so frightful mien,
> As to be hated needs but to be seen.
> Yet seen to oft, familiar with her face,
> We first endure, then pity, then embrace.[123]

To be feared and respected the law must not be foolish. A precedent that fails in any respect to serve the cause of truth and justice should be, in that respect, modified. That the precedents here discussed have so failed is attested to by experience and eminent authorities. There is a trend toward modification of the exclusionary rule. Indiana courts have established a firm basis for this reform by approving a damage remedy and by abolishing state soverign immunity. It would be gratifying if our supreme court would be first to complete this needed reform.

Recently, the supreme court has rendered notable service in tailoring other precedents so as to serve truth and justice. These, and other reforms, reduce the aspect of sportmanship that has become so evident in criminal procedure. They can speed up and increase the disposition of a court's business without detracting from the quality of justice. Yet, these benefits can be, and often are, eclipsed by what Justice Hunter correctly called our "anachronistic" venue laws.

The February 11, 1976, *State ex rel. Benjamin v. Criminal Court*[124] opinion conceded that the court's venue rules were questionable, whereupon the court ordered that those rules be "thoroughly studied and reconsidered." The court's rules prescribed a public report upon such study by July 1, 1976. When none was issued, a General Term Petition was filed on July 29, 1976. The chief justice's letter of August 4, 1976, to the judges of the Marion Coun-

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[122]A. POPE, AN ESSAY ON MAN (1733).

[123]*Id.* at epis. II, *l.* 217.

[124]341 N.E.2d 495 (Ind. 1976).

ty Criminal Court, admitted the abuses practiced under the courts venue rules. However, he wrote that two legal questions should be resolved in the process of any revision. Since these were law questions, they were for the court to decide; and it therefore should have decided if it or the General Assembly had jurisdiction to revise, and if, in doing so, the Indiana Constitution required equal venue rights for criminal defendants facing life imprisonment and civil litigants facing loss of one dollar.

The justices raised these two questions as problems to be dealt with in passing upon the General Term Petition. By their own rules, resolution of these questions was due by January 1, 1977, but has not been forthcoming. Judicial responsibility is the concomitant requirement of judicial authority. This also applies to trial judges. The law imposes upon trial judges the responsibility to dispose of litigation with dispatch and according to law; the venue rules undermine the trial judge's concomitant authority to do so.

For example, the justices ruled that defendants Benjamin and Green had the absolute right to emasculate the regular judge's authority without having or claiming any reason whatever. Nevertheless, these defendants disclosed their objections to him. Green swore she feared the regular judge would try her speedily and deny her probation because of her bad criminal record. Benjamin said he feared the judge would deny him "drug probation," which in his case—first degree burglary—the law forbade. So, under the court's rules, the trial judge is duty-bound to try cases with dispatch and follow the law—unless, that is, a litigant (including an admittedly guilty criminal) objects. The unvarnished truth is that with few exceptions, these changes are not sought in quest of a fair trial but rather to avoid any trial whatever with a soft plea bargain. The further truth is that the supreme court has armed criminals with a weapon whereby they can paralyze a busy criminal court. It is impossible for such a court to schedule and dispose of its business with one court facility, one staff, and dozens of special judges.

These admitted abuses could be reduced to manageable proportions by the proposal made, ignored, and indeed misstated in the *State v. Benjamin*[125] decision. This end could be accomplished by simply overruling *Barber v. State*,[126] which a reasonable interpretation of the 1905 statute fully warrants.[127] This is wholly within the jurisdiction of the supreme court.

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[125]No. CR75-472 C (Ind., Marion Cr. Ct., April 2, 1976).

[126]197 Ind. 88, 149 N.E. 896 (1925). See note 77 *supra* and accompanying text.

[127]IND. CODE § 35-1-25-1 (1976) (Orginally enacted as ch. 169, § 203, 1905 Ind. Acts 628). *See* note 78 *supra* and accompanying text.

If, however, the justices disagree with this solution, then it still remains their long-neglected responsibility to resolve the two questions they raised and then act, insofar as their asserted jurisdiction permits, to eliminate the abuses they admit. Courts should not be too timid to think nor too flaccid to act, even in the face of a potential "furor."

Notes

Judicial and Administrative Treatment of Accountants' Qualifications and Disclaimers

In the last ten years, litigation involving accountants has experienced a meteoric rise.[1] This Note seeks to introduce the reader to the various types of opinions issued by auditors, to examine judicial and Securities and Exchange Commission treatment of auditors' attempts to limit liability, and to explore methods by which auditors can better protect themselves from liability through improved disclosure techniques.

I. A View from the Accounting Profession

A. Definitions

Auditing is perhaps the most misunderstood and, consequently, the most litigated function that public accountants perform. This is in large part due to a misunderstanding of the significance of an auditor's opinion and a failure to recognize that financial statements should primarily be viewed as managements' representations.[2] The American Institute of Certified Public Accountants (A.I.C.P.A.), in a recent codification of professional standards, described the objective of the audit process as follows:

> The objective of the ordinary examination of financial statements by the independent auditor is the expression of an opinion on the fairness with which they present financial position, results of operations, and changes in financial position in conformity with generally accepted accounting principles. The auditor's report is the medium through which he expresses his opinion or, if circumstances require, disclaims an opinion. In either case, he states whether his examination has been made in accordance with generally accepted auditing standards.[3]

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[1] A recent estimate indicated that between 500 and 1,000 suits were pending at that time and over 200 decisions had been reported. Liggio, *Expanding Concepts of Accountants Liability*, 18 Calif. C.P.A. Q. 19, 20 (1974). *See also* Besser, *Privity?—An Obsolete Approach to the Liability of Accountants to Third Parties*, 7 Seton Hall L. Rev. 507, 507 n.2 (1976).

[2] *See* note 23 *infra*. In addition to auditing, public accounting firms perform considerable tax work, management services (such as developing management information systems), and write-up work.

[3] 1 A.I.C.P.A., AICPA Professional Standards *Auditing* § 110.01, at 61 (CCH 1976).

The following two key phrases contained in this description also appear in any opinion written by an accountant on financial statements: (1) "[I]n conformity with generally accepted accounting principles" (GAAP), and (2) "in accordance with generally accepted auditing standards" (GAAS).

> Generally accepted accounting principles incorporate the consensus at a particular time as to which economic resources and obligations should be recorded as assets and liabilities by financial accounting, which changes in assets and liabilities should be recorded, when these changes should be recorded, how the assets and liabilities and changes in them should be measured, what information should be disclosed and how it should be disclosed and which financial statements should be prepared.[4]

Although the A.I.C.P.A. has formulated elaborate general definitions of the term GAAP, it has not as yet codified all GAAP into a single writing.[5] The Accounting Principles Board (A.P.B.) and more recently the Financial Accounting Standards Board (F.A.S.B.) of the A.I.C.P.A.[6] have issued statements in a piecemeal fashion on specific items but have not as yet detailed all GAAP. Consequently, the profession is often confronted with the task of determining whether a particular accounting principle is generally accepted.[7] Problematically, an auditor's opinion must state whether the financial statements are presented fairly and in accordance with GAAP,[8] but in some in-

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[4]2 A.I.C.P.A., *APB Statement No. 4*, APB ACCOUNTING PRINCIPLES ¶ 137, at 9083-84 (CCH 1973). *See also* 2 A.I.C.P.A., *Accounting Terminology Bulletin No. 1*, APB ACCOUNTING PRINCIPLES ¶¶ 16-17, at 9505-06 (CCH 1973).

Perhaps the most concise definition of GAAP was that offered by the A.I.C.P.A. Special Committee on Opinions of the Accounting Principles Board, which defined GAAP as principles having "substantial authoritative support." *APB Statement No. 4*, *supra*, at 9505 n.38.

[5]For a recent article discussing this problem, *see* Carmichael, *What Does the Independent Auditor's Opinion Really Mean?*, 138 J. ACCOUNTANCY, Nov. 1974, at 83.

[6]At this point it would be wise to explain the various organizations having a direct impact on the accounting profession. The A.I.C.P.A. is the governing body of all C.P.A. members. From 1938 to 1959, the A.I.C.P.A.'s Committee on Accounting Procedure was the senior technical committee that was authorized to issue pronouncements on accounting principles. The Accounting Principles Board (A.P.B.) took over this function from 1959 to 1973, when it was replaced by the Financial Accounting Standards Board (F.A.S.B.). R. MONTGOMERY, MONTGOMERY'S AUDITING 25-26 (9th ed. 1975).

[7]*APB Statement No. 4*, *supra* note 4, ¶¶ 137-206, at 9083-103, offers a general discussion of how to determine whether a principle is generally accepted and the basic rules governing GAAP.

[8]AICPA PROFESSIONAL STANDARDS, *supra* note 3, § 410.01. *See also* A.I.C.P.A. CODE OF PROFESSIONAL ETHICS, Rule 203, *reprinted in* A.I.C.P.A. PROFESSIONAL STANDARDS, *supra* note 3, § 509.18. The SEC has a similar requirement for all financial

stances the auditor may not be sure whether a principle is generally accepted due to a lack of official pronouncements.

Unlike GAAP, GAAS have been the subject of a comprehensive codification by the A.I.C.P.A. GAAS are divided into three broad areas: General standards, standards of field work, and standards of reporting.[9] The following general standards are concerned with the qualifications of the auditor and the quality of his work:[10] (1) "The examination is to be performed by a person or persons having adequate technical training and proficiency as an auditor;"[11] (2) "[i]n all matters relating to the assignment, an independence in mental attitude is to be maintained by the auditor or auditors;"[12] and (3) "[d]ue professional care is to be exercised in the performance of the examination and preparation of the report."[13]

The following standards of field work focus on the mechanics of the audit and what is considered proper in the audit cycle: (1) "The work is to be adequately planned and assistants, if any, are to be properly supervised";[14] (2) "[t]here is to be a proper study and evaluation of existing internal control as a basis for reliance thereon and for the determination of the resultant extent of the tests to which auditing procedures are to be restricted";[15] and (3) "[s]ufficient competent evidential matter is to be obtained through inspection, observation, inquiries, and confirmations to afford a reasonable basis for opinion regarding the financial statements under examination."[16]

The following standards of reporting concern the content of the work product of the audit—the opinion: (1) "The report shall state whether the financial statements are presented in accordance with generally accepted accounting principles";[17] (2) "[t]he report shall

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statements certified by auditors. 17 C.F.R. § 210.2-02 (1977); Accounting Series Release No. 4, 5 FED. SEC. L. REP. (CCH) ¶ 72,005 (1938). Further compounding the problem, the SEC has taken the position that the F.A.S.B. should continue to determine GAAP for the purpose of compliance with securities laws. Accounting Series Release No. 150, 5 FED. SEC. L. REP. (CCH) ¶ 72,172 (1973).

[9]AICPA PROFESSIONAL STANDARDS, *supra* note 3, § 150.02.

[10]*Id.* § 201.01.

[11]*Id.* § 210.01.

[12]*Id.* § 220.01; A.I.C.P.A. CODE OF PROFESSIONAL ETHICS, Rule 101, *reprinted in* R. MONTGOMERY, *supra* note 6, at 18. The SEC also requires "independence in mental attitude" of an auditor certifying financial statements under the securities laws. 17 C.F.R. § 210.2-01(b) (1977). *See also* Accounting Series Release No. 126, 5 FED. SEC. L. REP. (CCH) ¶ 72,148 (1972); Accounting Series Release No. 47, 5 FED. SEC. L. REP. (CCH) ¶ 72,065 (1944).

[13]AICPA PROFESSIONAL STANDARDS, *supra* note 3, § 230.01.

[14]*Id.* § 310.01.

[15]*Id.* § 320.01.

[16]*Id.* § 330.01.

[17]*Id.* § 410.01.

state whether such principles have been consistently observed in the current period in relation to the preceeding period";[18] (3) "[i]nformative disclosures in the financial statements are to be regarded as reasonably adequate unless otherwise stated in the report";[19] and (4) "[t]he report shall contain either an expression of opinion regarding the financial statements, taken as a whole, or an assertion to the effect that an opinion cannot be expressed. When an overall opinion cannot be expressed, the reasons should be stated. In all cases wherein an auditor's name is associated with financial statements, the report should contain a clear-cut indication of the character of the auditor's examination, if any, and the degree of responsibility he is taking."[20]

This final standard of reporting mandates the ultimate work product of an audit—the auditor's opinion. The acceptable forms of opinions and the impact of deviations from them are the focal point of this Note. Before analyzing the A.I.C.P.A.'s technical requirements pertaining to an auditor's opinion, it is necessary to examine the procedures involved in a typical audit in order to fully appreciate what an opinion purports to represent and what duties an auditor assumes.

B. The Audit Cycle[21]

The primary function of an audit is to test the integrity and accuracy of the client's internal control,[22] thereby enabling the accountant to judge the accuracy and reliability of the client's financial statements.[23] The audit process can be divided into five general steps. The auditor must first obtain an understanding of the client's system and the nature of the client's business. Typically, the auditor examines prior working papers of predecessor auditors, interviews

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[18]*Id.* § 420.01.

[19]*Id.* § 430.01.

[20]*Id.* § 509.04.

[21]*See generally* R. MONTGOMERY, *supra* note 6, chs. 4-7.

[22]Internal control has been defined as comprising "the plan of organization and all of the coordinate methods and measures adopted within a business to safeguard its assets, check the accuracy and reliability of its accounting data, promote operational efficiency, and encourage adherance to prescribed managerial policies." AICPA PROFESSIONAL STANDARDS, *supra* note 3, § 320.09.

[23]The basic purpose of auditing is to verify the accuracy and acceptability of financial statements that management has prepared, not to draft the financial statements. The drafting of financial statements and resulting representations contained therein are primarily the responsibility of management, not the auditors. *Id.* § 110.02. Furthermore, the auditor does not purport to examine every account or physically count every item of inventory; rather his examination is based upon predetermined sampling techniques. Hence, a necessary element of imprecision is present in any audit.

operations management directly involved with the company's internal control, and refers to industrial source books for a general understanding of the nature of the client's business.

The second step is a preliminary evaluation of the client's internal control. Because auditing consists of gathering evidence by means of testing, the tests must be preceded by a preliminary evaluation of the client's internal controls to determine what to test and how extensively. The preliminary evaluation also aids in organizing the "audit program," which is a list of detailed steps to be performed at specified times.

Next, the auditor must perform functional tests to ascertain whether the internal control system on which the auditor intends to rely is functioning properly. Such tests seek to determine if preexisting internal control guidelines are consistently and properly followed.

After examining the strengths and weaknesses of the client's internal control system by functional testing, the auditor must reevaluate his audit program and modify it to conform to the functional test results. The results of the functional tests determine the extent to which the substantive tests will be applied. Substantive tests consist of validatory and analytic tests, such as obtaining confirmations from debtors and creditors, random sampling of inventory quantities, examining the accounting principles applied to management's recordation of financial resources, and evaluating judgments made by management that have an impact on valuation estimates.

Finally, the auditor must evaluate the information on the client's internal control system in light of the client's financial statements in order to determine if the statements accurately reflect the auditor's view of the recorded transactions. The results of this evalutaion appear in the auditor's written opinion.

C. Forms of Opinions

All opinions are typically divided into two parts. In the scope paragraph, the auditor outlines the nature and extent of the audit procedures applied and discloses any irregularities or limitations on the auditor's examination. In the opinion paragraph, the auditor specifies whether adequate disclosures have been made, whether such disclosures comply with GAAP, and whether the accounting principles utilized have been consistently applied.

1. The Standard Short-form Report.[24]—The scope and opinion paragraphs of the standard short-form report in essence state that

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[24]A model short-form opinion is as follows:

(Scope paragraph)

We have examined the balance sheet of X Company as of [at] December

the auditor understands the standards of his profession and has made an examination complying with such standards, and that the financial statements report the information fairly and in compliance with consistently applied GAAP. The short-form opinion—or any opinion for that matter—*does not* warrant the absence of fraud in the financial statements or state that the figures in the statements are accurate to the penny.[25] The auditor merely represents that he has not found any material problems or deficiencies, either in carrying out the audit or in examining the financial statements, of which the reader should be aware.

2. Variations of the Standard Report.—During the course of an audit, a variety of problems or deficiencies may be uncovered. The auditor is then confronted with the problem of deciding if the irregularity is of sufficient magnitude to require a departure from the standard short-form opinion.[26] If the auditor determines that such a

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> 31, 19XX, and the related statements of income, retained earnings and changes in financial position for the year then ended. Our examination was made in accordance with generally accepted auditing standards and, accordingly, included such tests of the accounting records and such other auditing procedures as we considered necessary in the circumstances.
>
> (Opinion paragraph)
>
> In our opinion, the financial statements referred to above present fairly the financial position of X Company as of [at] December 31, 19XX, and the results of its operations and the changes in its financial position for the year then ended, in conformity with generally accepted accounting principles applied on a basis consistent with that of the preceding year.

Id. § 509.07 (bracketed language in original).

[25]A common misconception about the auditor's role is that he is expected to detect fraud. From the standpoint of the accounting profession this is simply not correct:

> In making the ordinary examination, the independent auditor is aware of the possibility that fraud may exist. Financial statements may be misstated as the result of defalcations and similar irregularities, or deliberate misrepresentation by management, or both. The auditor recognizes that fraud, if sufficiently material, may affect his opinion on the financial statements, and his examination, made in accordance with generally accepted auditing standards, gives consideration to this possibility. However, the ordinary examination directed to the expression of an opinion on financial statements is not primarily or specifically designed, and cannot be relied upon, to disclose defalcations and other similar irregularities . . . . The responsibility of the independent auditor for failure to detect fraud . . . arises only when such failure clearly results from failure to comply with generally accepted auditing standards.

Id. § 110.05. The courts are not always sympathetic to this position. *E.g.*, 1136 Tenants' Corp. v. Max Rothenberg & Co., 319 N.Y.S.2d 1007, 36 App. Div. 2d 804 (1971) (accountant held liable for $174,000 plus interest for failure to detect and report defalcations of an apartment manager where the accountant alleged that he was only engaged to do *write-up work*).

[26]Variations from the standard short-form opinion can result where: (1) Limitations are placed on the scope of an audit, (2) the auditor's report is based in part on

departure is required, he must choose between the following forms of opinions: A qualified opinion, an adverse opinion, or a disclaimer of opinion.

(a) Qualified Opinion.—"A qualified opinion states that, 'except for' or 'subject to' the effects of the matter to which the qualification relates, the financial statements present fairly [the] financial position, results of operations and changes in financial position in conformity with generally accepted accounting principles consistently applied."[27] The typical grounds for a qualified opinion are: (1) Restrictions on the scope of an audit, (2) departures from GAAP in the financial statements, (3) inconsistent application of accounting principles, or (4) significant uncertainties present as of the statement date.[28]

In a qualified opinion,[29] the auditor should disclose all substantive reasons for the qualification in a separate explanatory paragraph, insert an exception in the opinion paragraph, and make reference to the separate explanatory paragraph in the opinion paragraph. The explanatory paragraph should also disclose the principal impact that the qualification's subject matter will have on the client's financial position and results of operations, if ascertainable.[30]

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another auditor's report, (3) financial statements are affected by departures from GAAP or from an accounting principle promulgated by the A.I.C.P.A., (4) accounting principles have not been consistently applied, (5) financial statements are affected by uncertainties concerning future events that are not susceptible to reasonable estimation at the statement date, (6) the auditor wishes to emphasize a matter, or (7) the auditor is not independent. AICPA PROFESSIONAL STANDARDS, *supra* note 3, §§ 509.09, 517.02.

[27] *Id.* § 509.29.

[28] *Id. See also* R. MONTGOMERY, *supra* note 6, at 754.

[29] *See generally* AICPA PROFESSIONAL STANDARDS, *supra* note 3, §§ 509.32-509.34.

[30] The following is a model of an opinion that is qualified due to departures from GAAP:

(Scope paragraph)

Same as short form unqualified report

(Separate explanatory paragraph)

The Company has excluded from property and debt in the accompanying balance sheet certain lease obligations, which, in our opinion, should be capitalized in order to conform with generally accepted accounting principles. If these lease obligations were capitalized, property would be increased by $XXX, long term debt by $XXX, and retained earnings by $XXX as of December 31, 19XX, and net income and earnings per share would be increased (decreased) by $XXX and $XXX respectively for the year then ended.

(Opinion paragraph)

In our opinion, except for the effects of not capitalizing lease obligations, as discussed in the preceding paragraph, the financial statements present fairly . . . .

Id. § 509.36. For models of qualifications arising due to lack of consistency, uncertainties, and scope limitations, *see id.* §§ 509.38, .39, & .40, respectively.

The auditor may abbreviate the explanatory paragraph by incorporating these disclosures into footnotes to the financial statements, provided the explantory paragraph refers to the footnotes. This format is permissible in all but one situation. Limitations as to the scope of the audit cannot be explained in footnotes, since a description of the audit's scope is the auditor's responsibility, not the client's.[31]

(b) Adverse Opinion.—An adverse opinion is one which states "that financial statements do *not* present fairly the financial position, the results of operations, or the changes in financial position in conformity with generally accepted accounting principles."[32] A typical ground for an adverse opinion is the failure of the financial statements to comply with GAAP. Another ground is inadequate disclosure on the part of the client—that is, the client declines to include information essential for fair presentation.[33] In determining whether to issue a qualified or adverse opinion, the materiality of the objectionable matter is the guiding element.[34]

In expressing an adverse opinion, the auditor should state in separate paragraphs all of the substantive reasons for such an opinion and the principal effects of the objectionable matter, if determinable. Furthermore, the auditor should clearly indicate in the opinion paragraph that the financial statements do not make an acceptable presentation.[35] As a practical matter, adverse opinions are very

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[31]*Id.* § 509.34. This limitation is explained by examining the respective roles of management and the auditor, as viewed by the A.I.C.P.A. Since the A.I.C.P.A. considers the financial statements to be primarily representations of management, and representations as to the scope of an audit to be the accountant's, the auditor should not intermingle his required disclosures with those of his client. *Id.* § 110.02.

[32]*Id.* § 509.41.

[33]*Id.* § 509.17. *See id.* §§ 430.01, .06, 545.04-545.05.

[34]*See* note 45 *infra* and accompanying text.

[35]AICPA PROFESSIONAL STANDARDS, *supra* note 3, § 509.42. A model opinion reads as follows:

> (Separate paragraph)
>
> As discussed in Note X to the financial statements, the Company carries its property, plant and equipment accounts at appraisal values, and provides depreciation on the basis of such values. Further, the Company does not provide for income taxes with respect to differences between financial income and taxable income arising because of the use, for income tax purposes, of the installment method of reporting gross profit from certain types of sales. Generally accepted accounting principles, in our opinion, require that property, plant and equipment be stated at an amount not in excess of cost, reduced by depreciation based on such amount, and that deferred income taxes be provided. Because of the departures from generally accepted accounting principles identified above, as of December 31, 19XX, inventories have been increased $..... by inclusion in manufacturing overhead of depreciation in excess of that based on cost; property, plant and equipment, less accumulated depreciation, is [sic] carried at $..... in excess of an amount based on the cost

rare and are usually found only if financial statements are prepared for a special and limited purpose.[36]

(c) Disclaimer of Opinion.—A disclaimer of opinion states the auditor *does not* express an opinion on the financial statements.[37] Due to some significant defect, in either the auditing process or the financial statements themselves, the auditor is not in a position to express an opinion or assume responsibility for the financial statements. The auditor must disclose in separate paragraphs all reasons for declining to express an opinion, as well as any other reservations he may have regarding the fairness of presentation of the financial statements in conformity with GAAP and their consis-

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to the Company; and allocated income tax of $..... has not been recorded; resulting in an increase of $..... in retained earnings and in appraisal surplus of $..... For the year ended December 31, 19XX, cost of goods sold has been increased $..... because of the effects of the depreciation accounting referred to above and deferred income taxes of $..... have not been provided, resulting in an increase in net income and earnings per share of $..... and $..... respectively.

(Opinion paragraph)

In our opinion, because of the effects of the matters discussed in the preceding paragraph, the financial statements referred to above do not present fairly, in conformity with generally accepted accounting principles, the financial position of X Company as of December 31, 19XX, or the results of its operations and changes in its financial position for the year then ended.

Id. § 509.43.

[36]R. MONTGOMERY, *supra* note 6, at 755.

[37]AICPA PROFESSIONAL STANDARDS, *supra* note 3, § 509.45. The following is an example of a disclaimer resulting from the auditor's inability to obtain sufficient evidential matter:

(Scope paragraph)

Except as set forth in the following paragraph, our examination was made in accordance with generally accepted auditing standards and accordingly included such tests of the accounting records and such other auditing procedures as we considered necessary in the circumstances.

(Separate paragraph)

The Company did not take a physical inventory of merchandise, stated at $..... in the accompanying financial statements as of December 31, 19XX, and at $..... as of December 31, 19XX. Further, evidence supporting the cost of property and equipment acquired prior to December 31, 19XX is no longer available. The Company's records do not permit the application of adequate alternative procedures regarding the inventories or the cost of property and equipment.

(Disclaimer paragraph)

Since the Company did not take physical inventories and we were unable to apply adequate alternative procedures regarding inventories and the cost of property and equipment, as noted in the preceding paragraph, the scope of our work was not sufficient to enable us to express, and we do not express, an opinion on the financial statements referred to above.

Id. § 509.47. *See id.* §§ 517.03, 542.05, 546.15 for other model disclaimer forms.

tent application. The disclaimer paragraph must make reference to the explanatory paragraph.[38]

Common situations giving rise to a disclaimer are: (1) Significant scope limitations of an audit,[39] (2) major uncertainties that cannot be resolved as of the statement date,[40] and (3) lack of independence of the auditor.[41]

(d) Piecemeal Opinion.—A piecemeal opinion is the converse of a qualified opinion. A qualified opinion expresses an opinion as to the entire financial statement and makes exceptions for particular items while a piecemeal opinion disclaims or is adverse as to the financial statement as a whole but renders an affirmative opinion as to specific items.[42] The A.I.C.P.A. indicated that as of January 31, 1975, it would no longer consider piecemeal opinions acceptable,[43] primarily because they "tend to overshadow or contradict a disclaimer of opinion or adverse opinion."[44]

Although more than one of the above forms of opinion could be appropriate for the same defect, the auditor must determine which form to employ, based upon the degree of materiality that the defect presents. The problem with this approach is there is no authoritative statement by the accounting profession that outlines what defects are "material" and should give rise to a disclaimer or adverse opinion rather than a qualified opinion. Five factors have been suggested as guidelines in making the decision: (1) The usefulness of the financial statements containing the defect, (2) the auditor's assessment of the reader's ability to understand the problem, (3) the auditor's ability to measure the potential impact of the problem, (4) the auditor's ability to describe his reservations about the financial statements with clarity, and (5) the extent of the auditor's disagreement with his client's handling of the matter.[45]

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[38] *Id.* §§ 509.45-509.46.

[39] *Id.* § 509.10.

[40] *Id.* § 509.25 n.8.

[41] *Id.* § 517.02.

[42] R. MONTGOMERY, *supra* note 6, at 760.

[43] AICPA PROFESSIONAL STANDARDS, *supra* note 3, § 509.50.

[44] *Id.* § 509.48.

[45] R. MONTGOMERY, *supra* note 6, at 762. The following factors have been suggested by the A.I.C.P.A. as guidelines in determining the materiality of the defect: Dollar magnitude of the effects, significance of an item to a particular enterprise, pervasiveness of the misstatement, and the impact on financial statements taken as a whole. AICPA PROFESSIONAL STANDARDS, *supra* note 3, § 509.16. "Materiality" has never been the subject of a specific A.I.C.P.A. release; however, several A.P.B. statements and opinions generally discuss "materiality." *See, e.g., APB Statement No. 4, supra* note 4, ¶ 128 at 9081. *See generally* Reininga, *The Unknown Materiality Concept*, 125 J. ACCOUNTANCY, Feb. 1968, at 30.

For the SEC's definition of "materiality," *see* 17 C.F.R. § 210.1-02(n) (1977); Accounting Series Release No. 41, 5 FED. SEC. L. REP. (CCH) ¶ 72,059 (1942); Securities

In light of the general criteria offered by the profession, an auditor's decision on the most suitable type of opinion is a difficult one. The impact of this decision, when considered in connection with the potential extent of resulting liability, presents a very real obstacle to the continued existence of public accounting firms unless clearer standards are advanced and put into operation.

II. Judicial and Administrative Treatment of Auditor's Opinions

Technical compliance with GAAS and GAAP becomes most important when an auditor is confronted with a suit by disgruntled users of the financial statements. Although compliance with the professional standards is not always a complete defense, it is clear that the courts look to GAAS and GAAP for guidance. Similarly, the Securities and Exchange Commission has indicated that it views the A.I.C.P.A. principles and standards as authoritative sources when examining financial statements and their supporting opinions for compliance with the federal securities laws.

A. Common Law

1. Introduction.[46]—The most common basis for suits against auditors at common law is misrepresentation. The important question is whether negligent misrepresentation rather than fraudulent misrepresentation will lie for third-party suitors not in privity.

The privity requirement presents a rather formidable obstacle to third parties not in privity who seek to recover damages from auditors for negligent misrepresentation. This requirement originated in England in 1842[47] and was quickly established in the

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Exchange Act Releases Nos. 5092 & 8995, [1970-71 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 77,915. Judicial attempts at defining materiality have resulted in a number of verbal formulations that generaly apply a "reasonable man"-type test. *See, e.g.*, T.S.C. Indus., Inc. v. Northway, Inc., 426 U.S. 438 (1976) (proxy solicitation); SEC v. Texas Gulf Sulfur Co., 401 F.2d 833 (2d Cir. 1968) (insider trading); Escott v. Barchris Constr. Corp., 283 F. Supp. 643 (S.D.N.Y. 1968) (prospectus). *See also* Kripke, *Rule 10b-5 Liability and "Material" "Facts,"* 46 N.Y.U. L. Rev. 1061 (1971).

[46]The initial discussion in this section on accountants' common law liability in general is not intended to be an exhaustive examination. For a more extensive treatment, *see* Chalmers, *Over-accountable Accountants? A Proposal for Clarification of the Legal Responsibilities Stemming from the Audit Function*, 16 Wm. & Mary L. Rev. 71 (1974); Note, *Accountants' Liabilities for False and Misleading Financial Statements*, 67 Colum. L. Rev. 1437 (1967).

[47]Winterbottom v. Wright, 152 Eng. Rep. 402 (Ex. 1842), is credited with establishing this requirement. In *Winterbottom*, a mail-coach driver brought an action to recover damages against a contractor hired by the Postmaster-General to keep the mail-coaches in repair. Due to the contractor's negligent servicing of the coach and a latent defect, it collapsed, injuring the driver. The Court of Exchequer denied recovery, due to the lack of privity between the driver and the contractor. The court

United States. This doctrine remained a firm barrier to third-party suitors lacking privity until the early part of the twentieth century. In 1919, judicial attitude began to shift, resulting in the first signs of the doctrine's rejection.[48] Shortly thereafter, the privity doctrine was rejected in *Glanzer v. Shepard*,[49] a case closely paralleling the facts of a typical accountant's liability suit. In *Glanzer*, a public weigher was hired by a bean vendor to weigh a quantity of the vendor's product and issue a certificate of weight to the buyer, who in turn remitted the purchase price to the vendor, based on the certified weight. The weigher negligently overstated the weight, causing the buyer to be overcharged. In upholding a directed verdict in favor of the buyer against the weigher for negligent misrepresentation, the court, in an opinion written by Justice Cardozo, specifically rejected the weigher's lack of privity defense.

Nine years after *Glanzer* the New York courts were called upon to decide the privity issue in the context of a suit by a disappointed moneylender against a public accounting firm. In *Ultramares Corp. v. Touche*,[50] an accounting firm was retained by Stern & Co. to prepare and issue an opinion on the company's financial statements. The accounting firm knew that Stern & Co. required extensive borrowing to finance its operations and that the financial statements would be exhibited to lenders to obtain credit. However, the accounting firm did not know the identity of the specific lenders, nor did it know how many loans the company might obtain in reliance upon these financial statements. The balance sheet, carrying an unqualified opinion,[51] represented Stern's net assets to be $1,070,000. In reality, the company was insolvent as of the statement date due to overstated inventories and inclusion of nonexistent accounts

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stated: "There is no privity of contract between these parties . . . . Unless we confine the operation of such contracts as this to the parties who entered into them, the most absurd and outrageous consequences, to which I can see no limit, would ensue." *Id.* at 405. *See* Landell v. Lybrand, 264 Pa. 406, 107 A. 783 (1919), for one of the early American cases refusing recovery to a third party for an accountant's negligent misrepresentation due to the lack of privity.

[48]MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916) (automobile manufacturer held liable to third party lacking privity for negligence in the construction of one of its automobiles).

[49]233 N.Y. 236, 135 N.E. 275 (1922).

[50]255 N.Y. 170, 174 N.E. 441 (1931).

[51]The opinion appeared as follows:

> We have examined the accounts of Fred Stern & Co., Inc., for the year ending December 31, 1923, and hereby certify that the annexed balance sheet is in accordance therewith and with the information and explanations given us. We further certify that . . . in our opinion, [it] presents a true and correct view of the financial condition of Fred Stern & Co., Inc., as at December 31, 1923.

Id. at 174, 174 N.E. at 447.

receivable. In reliance on the financial statements, plaintiff advanced $165,000 to the company, which subsequently was declared bankrupt.

The jury awarded plaintiff damages based on the accounting firm's negligence in performing the audit, but the trial court set aside the verdict. On appeal, Justice Cardozo, writing for the court, noted that although negligence was clearly shown, the crucial question was whether the accounting firm owed plaintiff a duty of reasonable care. Impressed by the potential extent of an auditor's liability if the jury verdict were reinstated,[52] Cardozo decided that the auditors did not owe a duty of reasonable care to plaintiff. The court noted, however, that liability would exist for fraud and that a showing of an auditor's gross negligence could give rise to an inference of fraud.[53]

The court's reasons for distinguishing *Glanzer* were also significant. The court stated that in *Glanzer* the services of the weigher were primarily for the benefit of the buyer, while in *Ultramares*, the auditors' services were primarily for the benefit of the client and secondarily for the benefit of the lenders.[54] This distinction, later referred to as the "primary beneficiary rule," has been applied to require proof of fraudulent misrepresentation in actions by third parties not in privity with auditors, unless the third parties were the primary beneficiaries of the financial statements in which case negligence would suffice.[55] In order to be a primary beneficiary, the

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[52]"If liability for negligence exists, a thoughtless slip or blunder, the failure to detect a theft or forgery beneath the cover of deceptive entries, may expose accountants to a liability in an indeterminate amount for an indeterminate time to an indeterminate class." *Id.* at 179, 174 N.E. at 444.

[53]"[N]egligence or blindness, even when not equivalent to fraud, is none the less evidence to sustain an inference of fraud." *Id.* at 190-91, 174 N.E. at 449. *See also* State St. Trust Co. v. Ernst, 278 N.Y. 104, 15 N.E.2d 416, 5 N.Y.S.2d 104 (1938) (interpreting *Ultramares*).

[54]255 N.Y. at 174, 174 N.E. at 445-46.

[55]Nortek, Inc. v. Alexander Grant & Co., 532 F.2d 1013, 1015 (5th Cir. 1976); Koch Indus., Inc. v. Vosko, 494 F.2d 713, 724-25 (10th Cir. 1974); Stephens Indus., Inc. v. Haskins & Sells, 438 F.2d 357, 359 (10th Cir. 1971); Canaveral Capital Corp. v. Bruce, 214 So. 2d 505, 505 (Fla. Dist. Ct. App. 1968); Investment Corp. of Fla. v. Buchman, 208 So. 2d 291, 293 (Fla. Dist. Ct. App. 1968); State St. Trust Co. v. Ernst, 278 N.Y. 104, 15 N.E.2d 416, 5 N.Y.S.2d 104 (1938); Duro Sportswear, Inc. v. Cogen, 131 N.Y.S.2d 20 (Sup. Ct. 1954); Beardsley v. Ernst, 47 Ohio App. 241, 191 N.E. 808 (1934); Milliner v. Elmer Fox & Co., 529 P.2d 806 (Utah 1974).

A number of decisions purporting to apply the *Ultramares* rule have mistakenly interpreted the case as precluding all negligence suits by third parties not in privity. *See, e.g.*, O'Connor v. Ludlam, 92 F.2d 50, 53 (2d Cir. 1937) ("Since there was no contractual relationship between the plaintiffs and the defendants, liability could be imposed only for fraud . . . ."); MacNerland v. Barnes, 129 Ga. App. 367, 369, 199 S.E.2d 564, 566 (1973) ("The general rule is that in the absence of intentional misrepresentation or fraud, an accountant is not liable for negligence to a third party who is not in privity with the accountant.").

Ultramares rule required that the "end aim" of the auditor's engagement be for the benefit of the third-party suitor. The net result of the primary beneficiary rule was that very few third parties recovered from accountants.

This was generally the state of the law until 1965 when section 552 of the *Restatement (Second) of Torts*[56] appeared in tentative draft form. The Restatement gives a very liberal interpretation to the law of negligent misrepresentation by professionals to third parties. The Restatement comments suggest that the class of plaintiffs allowed to recover be expanded to include not only "primary beneficiaries" but also specific persons or classes of persons who will rely on the information in the specific transaction.[57]

The full impact of section 552 on the *Ultramares* rule remains to be seen. However, most recent cases have discussed the Restatement section, and at least one court appears to have adopted it.[58] The balance of the cases are somewhat confused, but it appears that the primary beneficiary rule is being given a more liberal interpretation, and its application now includes a number of situations that heretofore would not have been included.[59]

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[56]RESTATEMENT (SECOND) OF TORTS § 552 (1976) states in full:

(1) One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

(2) Except as stated in Subsection (3), the liability stated in Subsection (1) is limited to loss suffered

(a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and

(b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.

(3) The liability of one who is under a public duty to give the information extends to loss suffered by any of the class of persons for whose benefit the duty is created, in any of the transactions, in which it is intended to protect them.

[57]*Id.*

[58]Rhode Island Hosp. Trust Nat'l Bank v. Swartz, Bresenoff, Yavner & Jacobs, 455 F.2d 847 (4th Cir. 1972), involved an action by a bank against an auditor for performing a negligent audit, causing the bank to rely on erroneous financial statements when loaning funds to a soon-to-be defunct corporation. The Fourth Circuit Court of Appeals appears to have construed Rhode Island law as accepting the Restatement position, noting that "an accountant should be liable in negligence for careless financial misrepresentations relied upon by actually foreseen and limited classes of persons." *Id.* at 851 (quoting Rusch Factors, Inc. v. Levin, 284 F. Supp. 85, 93 (D.R.I. 1968)). *See* text accompanying note 83 *infra*.

[59]*See* Coleco Indus., Inc. v. Berman, 423 F. Supp. 275 (E.D. Pa. 1976); Rusch Factors, Inc. v. Levin, 284 F. Supp. 85 (D.R.I. 1968); Ryan v. Kanne, 170 N.W.2d 395 (Iowa

2. Treatment of Attempted Limitations of Liability.—The first reported case to deal with a departure from the standard short-form report was *Beardsley v. Ernst*,[60] in which Ernst & Ernst performed an audit of the International Match Corp. and issued an opinion[61] that was qualified due to the auditors' reliance on foreign subsidiary statements not verified by their audit. Plaintiff purchased International Match securities in reliance on these financial statements and, after International Match was declared bankrupt, filed suit against the auditors, alleging fraudulent misrepresentation. Plaintiff claimed that the auditors had certified certain facts to be true without actual knowledge of the condition of the foreign subsidiaries. Agreeing with plaintiff, the court found that under the *Ultramares* rule a cause of action for deceit would lie where the auditors certified as true facts of which they had no actual knowledge. However, in *Beardsley*, the court reasoned that because the auditors had disclosed their reliance on the unverified statements from abroad,[62] there was no pretense of actual knowledge, thereby negating the scienter requirement of the fraud action.[63]

This case is of little precedential value today, due primarily to the more rigid A.I.C.P.A. requirements regarding qualifications. The *Beardsley* qualification would undoubtedly be considered inadequate

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1969); Bonhiver v. Graff, 248 N.W.2d 291 (Minn. 1976); Aluma Kraft Mfg. Co. v. Elmer Fox & Co., 493 S.W.2d 378 (Mo. Ct. App. 1973); Shatterproof Glass Corp. v. James, 466 S.W.2d 873 (Tex. Ct. App. 1971). *But see* Stephens Indus., Inc. v. Haskins & Sells, 438 F.2d 357 (10th Cir. 1971); Canaveral Capital Corp. v. Bruce, 214 So. 2d 505 (Fla. Dist. Ct. App. 1968); Investment Corp. v. Buchman, 208 So. 2d 291 (Fla. Dist. Ct. App. 1968).

[60]47 Ohio App. 241, 191 N.E. 808 (1934).

[61]The opinion read as follows:

> We hereby certify that we have examined the books of account and record of International Match Corporation and its American Subsidiary company at December 31, 1929, and have received statements from abroad with respect to the foreign constituent companies as of the same date. Based upon our examination and information submitted to us it is our opinion that the annexed Consolidated Balance Sheet sets forth the financial condition of the combined companies at the date stated, and that the related Consolidated Income and Surplus Account is correct.

Id. at 243, 191 N.E. at 809.

[62]"The lanugage used in these certificates gives rise to the indisputable inference that the accountants had not examined the books and records of the foreign constituent companies." *Id.* at 245, 191 N.E. at 810.

[63]The RESTATEMENT OF TORTS § 526 (1938) gave the three accepted forms of scienter required for misrepresentation in the business context:

> (a) knows or believes the matter to be otherwise than as represented, or (b) knows that he has not the confidence in its existence or non-existence asserted by his statement of knowledge or belief, or (c) knows that he has not the basis for his knowledge or belief professed by his assertion.

Compare RESTATEMENT (SECOND) OF TORTS § 526 (1976).

by today's standards, particularly in view of the fact that the auditors had not taken an explicit exception in the opinion paragraph.[64] In order to avoid imposing liability, the court was forced to "infer" the required disclosure.

In a more recent case dealing with a qualification, *C.I.T. Financial Corp. v. Glover*,[65] a lending institution, in reliance on audited statements by defendant-accountants, loaned Manufacturers Trading Corp. considerable funds over a period of several years. The corporation's business consisted in part of "purchasing" commercial receivables, relying primarily on the borrower's collateral rather than his overall financial stability because of the shaky postition of most debtors. Crucial to the success of this venture was an accurate appraisal of such collateral, which was an extremely difficult task. The corporation's early success was in large part due to the particular genius of one of its officers in appraising collateral. During the course of their audit, the accountants learned of this situation and, recognizing their inability to properly appraise the collateral, issued a qualified opinion.[66] After the corporation was declared bankrupt, the lender filed suit against the auditors, claiming that the auditors had been negligent in conducting pre- and post-loan audits and by concealing the overvalued receivables of the corporation.

Plaintiff claimed that although proper disclosure had been made as to the method of valuing the underlying collateral, no such disclosure was made as to the general collectibility of the receivables, most of which were grossly overvalued. The auditors subsequently prevailed, arguing that the corporation had not relied upon the overall financial stability of the borrowers (or the face value of the receivable) but rather only upon the supporting collateral, and this reliance was appropriately disclosed. The Second Circuit Court of Appeals, in upholding a jury verdict for the

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[64]At the very least, the opinion should have contained a separate paragraph indicating their failure to audit the foreign records, the scope paragraph should have referred to this separate paragraph, and their opinion paragraph should have contained an "except for" sentence disclosing their reliance. *See generally* AICPA PROFESSIONAL STANDARDS, *supra* note 3, §§ 509.32-509.35.

[65]224 F.2d 44 (2d Cir. 1955).

[66]The opinion read as follows:

> While it is not within our province to pass upon or assume responsibility for the legal or equitable title to the commercial receivables purchased by the companies *or the valuation of any security thereto accepted and held by them*, it was apparent from their books and records and by opinion of counsel, that their contractual and assignment forms are adequate for their legal protection in connection with the collection and liquidation of commercial receivables purchased.

Id. at 46 (emphasis added).

auditors, ruled that a jury could have reasonably found that the dichotomy between the face value of the receivable and the appraised value of the collateral was meaningless and that the method of valuation had been adequately disclosed. This finding upheld the auditors' assertion that the qualification as to valuation of the collateral extended to the face value of the receivable as well.[67]

It is difficult to assess the overall adequacy of the auditors' qualification in *Glover*, since the court's opinion only reproduced a limited portion of the qualification. In all probability, the portion reproduced was the explanatory paragraph in which case the A.I.C.P.A.'s requirements would now demand considerably more disclosures than those made. The reasons for the qualification should have been set forth more clearly, rather than merely stating: "[I]t is not within our province . . . ."[68] The degree of reliance that the corporation placed on the valuation of the supporting collateral and its relationship to the ultimate collectability of the receivables should also have been disclosed.[69] Finally, the auditors should have noted the impact on the overall stability of the corporation if a considerable number of the receivables had proved uncollectible.[70]

In *Stephens Industries, Inc. v. Haskins & Sells*,[71] two car-rental companies retained the defendant-accountants to determine their net worth and to conduct an audit in anticipation of the sale of the two companies. The audit was initiated pursuant to the purchase agreement between plaintiff and the companies, the terms of which specifically provided that accounts receivable were not to be adjusted to reflect uncollectible accounts.[72] In reliance on the audited statements, plaintiff purchased a two-thirds interest in the two companies. After both companies failed, plaintiff filed suit against the accountants, claiming that the audited statements misrepresented the value of both companies' accounts receivable. The accountants disclosed the failure to adjust accounts receivable in a footnote to the balance sheet and qualified their opinion in this respect.[73]

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[67]*Id.*

[68]AICPA PROFESSIONAL STANDARDS, *supra* note 3, § 509.35.

[69]*Id.* §§ 509.32-509.34.

[70]*Id.* § 509.33.

[71]438 F.2d 357 (10th Cir. 1971).

[72]The contract provided in part: "[A]ccounts receivable as shown by the records of such corporations, shall be used in determining net worth without adjustment to reflect the fact that the auditors may feel certain accounts are or may be uncollectible in whole or part." *Id.* at 358.

[73]The scope paragraph of their opinion read as follows:

> Our examination was made in accordance with generally accepted auditing standards, and accordingly included such tests of the accounting records and such other auditing procedures . . . as we considered necessary in the circumstances, excepting that in accordance with your instructions we

Plaintiff claimed that the auditors had failed to disclose the questionable nature of the accounts receivable and were therefore liable for misrepresenting the financial condition of the companies. The court rejected this argument, noting that both the auditors' opinion and the balance sheet footnote had adequately disclosed the failure to adjust accounts receivable for uncollectibles. Hence, the court found that the auditors had not consciously concealed crucial information and had exercised the required degree of care and competence demanded of the accounting profession in communicating the relevant information.[74]

The court's opinion can be read as holding that if an auditor's qualification is sufficiently clear and adequately discloses the nature of the problem, he will be absolved from liability. At the same time, it should be noted that the auditors' defense in *Stephens Industries* was considerably strengthened by a clause in the contract-to-sell that specifically excluded accounts receivable from the audit verification.

In *MacNerland v. Barnes*,[75] Airways Rent-A-Car retained defendant-accountant Barnes to prepare its financial statements prior to a sale of its stock. The financial statements overstated seller's accounts receivable by $45,000. However, Barnes issued a disclaimer of opinion based on his lack of independence from the client.[76] The stock purchasers brought suit claiming, *inter alia*, that Barnes had been negligent in his preparation of the financial statements due to his failure to disclose known discrepancies in the client's accounts receivable.

The Georgia Court of Appeals reversed the trial court's summary judgment in favor of Barnes, but stated that an accountant would not be liable to third parties not in privity for mere negligence in preparing financial statements containing an express disclaimer, absent specific undertakings by the accountant that were inconsistent with the disclaimer. The court remanded the case for a

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did not request any of the customers to confirm their balances nor did we review the collectibility of any trade accounts receivable.

Id. at 360-61 n.1.

A note attached to the balance sheet under accounts receivable disclosed the following: "The balance shown on the balance sheets is the total of the daily accounts receivable records of the companies and has not been adjusted to reflect uncollectible accounts, the amount of which was not determined at December 31, 1964." *Id.*

[74]*Id.*

[75]129 Ga. App. 367, 199 S.E.2d 564 (1973).

[76]The disclaimer read: "Disclaimer of opinion. We are not independent with respect to Airway's Rent-A-Car of Atlanta, and the accompanying balance sheet as of March 31, 1970 and the related statement of income and accumulated deficit for the three months then ended were not audited by us; accordingly, we do not express an opinion on them." *Id.* at 370, 199 S.E.2d at 566.

jury determination of whether Barnes had agreed with plaintiff to verify certain major accounts in which case the disclaimer would presumably be ineffective, at least as to those accounts.[77]

The *Barnes* holding was explored in greater detail in *Ryan v. Kanne*,[78] which involved a suit by two accountants to collect their auditing fees and a counterclaim by the defendant-corporation against the auditors for negligent misrepresentation. James Kanne had retained the auditors to certify the financial statements of his lumber supply business, which he operated as a sole proprietorship. When the accountants were hired, Kanne specifically instructed them to pay particular attention to accounts payable-trade and to use every possible method to verify the balances. The auditors were also informed that the financial statements would be used to obtain financing or to incorporate. The auditors completed their audit and submitted to Kanne financial statements headed "Unaudited Statement."[79] The auditors' cover letter accompanying the statements read as follows:

> Accounts Payable-Trade. Confirmations were used to arrive at the balance due at the date of the balance sheet. The payee of each check issued during 1965 and the latter part of calendar year 1964 was contracted [sic] to confirm if a balance was due at September 30, 1965. Also, a review of unpaid statements was made.[80]

The auditors also made oral representations that accounts payable-trade would be accurate to within $5,000 of the balance sheet amount. In reliance on these statements, the proprietorship was incorporated and defendant Kanne Lumber Supply Company took over its assets and liabilities. A later audit of the corporation showed that the accounts payable-trade were understated by $33,689.22. Furthermore, the auditors had failed to check a considerable number of unpaid invoices, contrary to the representations made in their cover letter.

In upholding a judgment for the defendant-corporation on its counterclaim, the Iowa Supreme Court discussed the effect of the disclaimer, noting that the auditors' "liability must be dependent upon their undertaking, not their rejection of dependability. They

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[77]*Id.* at 372, 199 S.E.2d at 567.

[78]170 N.W.2d 395 (Iowa 1969).

[79]The A.I.C.P.A. requires that a disclaimer of opinion must accompany all the unaudited financial statements. AICPA PROFESSIONAL STANDARDS, *supra* note 3, § 516.04. For further discussion of unaudited financial statements, *see* notes 88-96 *infra* and accompanying text. The *Ryan* court indicated that a disclaimer was in fact issued; however, it was not reproduced in the court's opinion.

[80]170 N.W.2d at 398.

cannot escape liability for negligence by a general statement that they disclaim [the report's] reliability."[81]

These cases point out that auditors cannot insulate themselves from liability by a general disclaimer and at the same time make contrary representations as to specific items. If auditors have agreed to verify particular items or represent that they have done so, a general disclaimer of opinion will be no defense, at least as to errors in the specified items.[82] Care should also be taken in drafting cover letters to be attached to financial statements. If a cover letter contains ambiguous or inconsistent representations regarding the nature or scope of the examination, this could be construed to be inconsistent with the disclaimer, thereby negating the effect of the disclaimer as to the stated items. Finally, auditors should clearly spell out the nature of their engagement immediately after accepting the assignment in order to avoid later disagreements as to the scope of their undertaking.

Another recent case dealing with an attempted limitation of common law liability is *Rhode Island Hospital Trust National Bank v. Swartz, Bresenoff, Yavner & Jacobs.*[83] International Trading Corp. retained the defendant-auditors to audit its records and certify its financial statements, as required by the terms of a loan agreement with the plaintiff-bank. The financial statements prepared by the corporation reflected a capitalized expenditure of $212,000 for leasehold improvements at various facilities in Florida, Georgia, and Rhode Island. In fact, no such improvements had been made, and the amount capitalized represented ordinary operating expenses, the effect of which was to overstate assets and net income. Had the expenses been properly recorded, the corporation would have reported a loss for the year rather than the reported gain. During the course of the audit, the auditors noticed considerable discrepancies between the alleged assets and the supporting cost records. In the explanatory paragraph preceding their disclaimer,[84] the auditors disclosed the problems encountered in auditing the cost records of the nonexistent leasehold improvements as follows:

> *Additions* to fixed assets in 1963 *were found* to include principally warehouse improvements and installation of

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[81] *Id.* at 404.

[82] *Id.* (citing C.I.T. Financial Corp. v. Glover, 224 F.2d 44 (2d Cir. 1955)).

[83] 455 F.2d 847 (4th Cir. 1972). *See* note 58 *supra.*

[84] Defendant's disclaimer read as follows: "Because of the limitations upon our examination expressed in the preceding paragraphs and the material nature of the items not confirmed directly by us, we are unable to express an opinion as to the fairness of the accompanying statements." 455 F.2d at 850.

> machinery and equipment . . . . Practically *all this work was done by company employees and materials and overhead was borne by International Trading Corporation and its affiliates.* Unfortunately, fully complete detailed cost records were not kept of these capital improvements and no exact determination could be made as to the actual cost of said improvements.[85]

Plaintiff-bank, in reliance on the audited financial statements, extended additional money to the corporation, and subsequently initiated this suit against the auditors when the corporation became unable to repay.

The district court dismissed the complaint, ruling that the bank had failed to establish misrepresentation or negligence by the accountants in their audit. The Fourth Circuit Court of Appeals reversed as to the negligence issue and rejected the auditors' defense based upon the disclaimer. The court examined in detail the wording of the disclaimer and the explanatory paragraph, noting that the disclaimer followed other references that expressed the auditors' reservations as to the value of the leasehold improvements *but not* as to their existence. In addition, the auditors' cover letter stated, as a reason for the disclaimer, that adequate cost records had not been kept as to the leasehold improvements, when, in fact, no cost records ever existed. The court ruled that both these disclosures were inadequate to convey the required information and absolve defendant from liability.[86]

There were two principal flaws in the auditors' disclaimer. First, the explanatory paragraph did not adequately explain the reasons for issuing a disclaimer when it failed to disclose the total absence of cost records, thereby creating the impression some records were kept. Second, the explanatory paragraph, disclaimer paragraph, and the cover letter all conveyed the impression that the leasehold assets did exist and had *some* value when in reality they did not.[87] The *Rhode Island Trust* opinion again points out that extra care should be taken in drafting explanatory paragraphs and cover letters so as to maximize disclosure and minimize the chances of creating false impressions, since courts will carefully scrutinize the wording of these statements.

Even when an accountant is retained to conduct services other than an audit, he may be subject to liability for inaccuracies under special circumstances if he is deemed to be "associated with" the

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[85] *Id.* at 849 (emphasis added).

[86] *Id.* at 852.

[87] *Id.*

financial statements. This situation most commonly occurs when an accountant is retained to prepare unaudited financial statements.[88] The minimum A.I.C.P.A. standards require all unaudited financial statements that an accountant is "associated with" to carry a disclaimer clearly indicating that no audit has been conducted.[89]

Stanley L. Bloch, Inc. v. Klein[90] illustrates the effect of an accountant's failure to comply with these minimal requirements. In *Bloch*, the defendant-accountants prepared and issued financial statements on their stationery with no opinion attached. In a subsequent suit by the disappointed client, the court noted that A.I.C.P.A. standards minimally require an accountant to attach an opinion or disclaimer to a financial statement.[91] Because the accountants had failed to disclaim or qualify their nonexistent opinion, the court assumed that the accountants had intended to issue an unqualified opinion and imposed liability for the accountants' failure to physically verify the client's inventory as required by contemporary professional standards.[92] Accordingly, accountants should take care to append a disclaimer of opinion whenever there is a possibility of being "associated with" financial statements. As shown by *Bloch*, this is true even when statements are prepared only for internal use by the client.

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[88] The A.I.C.P.A. deems an accountant to be "associated with" unaudited financial statements

> when he has consented to the use of his name in a report, document, or written communciation setting forth or containing the statements. Further, when a certified public accountant submits to his client or others, with or without a covering letter, unaudited financial statements which he has prepared or assisted in preparing, he is deemed to be associated with such statements. This association is deemed to exist even though the certified public accountant does not append his name to the financial statements or uses "plain paper" rather than his own stationery.

AICPA PROFESSIONAL STANDARDS, *supra* note 3, § 516.03. An auditor is deemed not to be "associated with" the financial statements *only* when he was not involved in their preparation, reproduces them on "plain paper," and only submits the statements to his client. *Id.* § 516.03.

[89] *Id.* § 516.04. It follows from the nature of the financial statements that the auditor probably will not be in a position to express an opinion as to their conformity with GAAP. However, if the accountant is aware of nonconforming items, he must insist that his client make the required changes, or, if the client refuses, the accountant should clearly note the departures from GAAP in his disclaimer. *Id.* §§ 516.06-516.07. *See also* 1136 Tenants Corp. v. Max Rothenberg & Co., 36 App. Div. 2d 804, 319 N.Y.S.2d 1007 (1971) (accountant hired only to do write-up work had a duty to report material irregularities discovered during the course of preparing the statements).

[90] 45 Misc. 2d 1054, 258 N.Y.S.2d 501 (Sup. Ct. 1965).

[91] *Id.* at 1058, 258 N.Y.S.2d at 506.

[92] *Id.* at 1058, 258 N.Y.S.2d at 506-07. However, the court went on to hold the accountants liable only for auditing fees, ruling that the client failed to establish that further damages were proximately caused by the accountants' negligence. *Id.* at 1060, 258 N.Y.S.2d at 508.

In *Coleco Industries, Inc. v. Berman*,[93] the court discussed the extent of an accountant's responsibilities when associated with unaudited reports. In *Coleco*, the defendant-accountants were retained to prepare unaudited financial statements prior to plaintiff's purchase of a business. The accountants made several errors of varying significance in the preparation of the statements. In the suit that followed, the accountants raised the defense that there could be no liability imposed for errors contained in unaudited financial statements, but the court rejected this argument and held them liable for negligent preparation of the financial statements.[94] Of particular significance was the court's finding that the mistakes were only simple mathematical errors. In a footnote, the court stated that when mechanical errors are made, no differing standard should be applied to audited and unaudited financial statements, since in both cases, parties can reasonably assume that accountants will correctly perform simple mathematical functions.[95] A moderately liberal reading of *Coleco* could lead to the conclusion that an accountant cannot escape liability for unaudited financial statements containing erroneous items that would be discoverable or correctable without an audit.[96]

3. Conclusion: Common Law Liability.—Taking the above cases together, some general conclusions can be drawn regarding the effects of qualifications and disclaimers at common law. There is a noticeable trend in recent cases to examine in detail the specific working of the disclaimer or qualification and to judge the adequacy of the disclosure in light of the situation in its fully developed form, rather than in the position of the auditor at the time the opinion was issued. This puts considerably more pressure on the auditor to closely examine the situation in determining what to disclose and how to disclose it.

Auditors should not rely solely upon their opinions or disclaimers to reveal potential problem areas but should attempt to disclose the required information in as many places as possible—in footnotes, cover letters, and explanatory paragraphs to the auditors' opinion. Auditors must, however, avoid equivocal or contradictory representations in cover letters, explanatory paragraphs, and

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[93]423 F. Supp. 275 (E.D. Pa. 1976).

[94]*Id.* at 310.

[95]*Id.* nn.59 & 60. The court stated: "[W]e believe even the most restricted undertaking would impose on [the accountant] a duty to multiply correctly and to make overhead deductions from inventory that can be simply computed." *Id.* n.59.

[96]An interesting case involving "associated with" liability that defies categorization is Bonhiver v. Graff, 248 N.W.2d 291 (Minn. 1976). In *Bonhiver*, liability was imposed upon accountants for negligence when third parties relied upon erroneous items in the accountants' *working papers*.

disclaimer paragraphs, as well as in oral statements that tend to negate or overshadow the qualification or disclaimer. In addition, auditors should take care to clearly spell out the nature and extent of their engagement to the client as soon as possible after acceptance of the assignment.

When drafting reports, auditors would be wise to note specific departures from GAAS, rather than enumerating procedures actually performed and leaving to inference procedures not followed. *Rhode Island Trust* illustrates the dangers created by the latter when courts scrutinize the auditor's opinion in light of the fully developed circumstances.

B. Treatment of Qualifications and Disclaimers Under the Securities Laws

1. Introduction.—Auditors are brought under the purview of the Securities and Exchange Commission through the disclosure requirements of the Securities Acts of 1933 and 1934.[97] The 1933 Act requires initial public offerings of securities to be accompanied by certified financial statements both in the registration statement filed with the SEC[98] and in the prospectus sent with the stock.[99] The 1934 Act provides for initial registration and continuous filing of reports that generally must contain certified financial statements.[100]

The threshold question involving qualifications and disclaimers under the securities laws is not whether they serve as a basis for insulating the auditor from liability but whether the reporting requirements of the Acts are satisfied when such limitations are present. Accordingly, the bulk of this discussion distinguishes the types of qualifications that are acceptable and the types that fail to satisfy the reporting requirements of the 1933 and 1934 Securities Acts.

Section 11[101] of the 1933 Act, sections 18[102] and 10(b)[103] of the 1934 Act and rule 10b-5[104] provide methods by which third-party suitors and the SEC may proceed against accountants for their part in filing false or misleading financial statements with the Commission. In addition, if an auditor certifies financial statements and the report fails to satisfy the disclosure requirements of the 1933 or 1934 Acts, the SEC has the power to initiate disciplinary proceedings against

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[97]15 U.S.C. §§ 77(a)-(aa), 78(a)-(jj) (1976).
[98]*Id.* § 77(g).
[99]*Id.* § 77(j).
[100]*Id.* § 78(m)(a)(2).
[101]*Id.* § 77k(a).
[102]*Id.* § 78(r).
[103]*Id.* § 78(j).
[104]17 C.F.R. § 240.10b-5 (1977).

the auditor that could result in temporary or permanent denial of the privilege to practice before the Commission.[105]

In general, the SEC has not promulgated specific auditing standards or procedures to be followed by auditors certifying financial statements under the securities laws, but it has left the development of standards and procedures to the accounting profession.[106] Consequently, A.I.C.P.A. standards play a major role in determining the adequacy of the financial statements and supporting opinions filed with the Commission. However, the SEC does require certain items to appear in all auditor's reports filed with the Commission.[107]

2. SEC Treatment of Qualifications and Disclaimers.—The effect of a disclaimer under the securities laws is fairly easy to determine. Both the 1933 and 1934 Acts require financial statements filed with the SEC to be certified.[108] "Certified," in the context of financial statements, is defined as "examined and reported upon with an opinion expressed by an independent public or certified public accountant."[109] In addition, the S-X regulations contain an implicit assumption that an opinion will be expressed.[110] Since the securities laws

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[105] *Id.* § 201.2(e).

[106] This policy was first announced in McKesson & Robbins, Inc., Accounting Series Release No. 19, 5 FED. SEC. L. REP. (CCH) ¶ 72,020 (1940).

[107] 17 C.F.R. § 210 (1977). The required contents of an auditor's report (opinion) are:

(a) *Technical requirements.* The accountant's report (1) shall be dated; (2) shall be signed manually; (3) shall indicate the city and State where issued; and (4) shall identify without detailed enumeration the financial statements covered by the report.

(b) *Representations as to the audit.* The accountant's report (1) shall state whether the audit was made in accordance with generally accepted auditing standards; and (2) shall designate any auditing procedures deemed necessary by the accountant under the circumstances of the particular case, which have been omitted, and the reasons for their omission. Nothing in this rule shall be construed to imply authority for the omission of any procedure which independent accountants would ordinarily employ in the course of an audit made for the purpose of expressing the opinions required by paragraph (c) of this section.

(c) *Opinion to be expressed.* The accountant's report shall state clearly: (1) The opinion of the accountant in respect of the financial statements covered by the report and the accounting principles and practices reflected therein; and (2) the opinion of the accountant as to the consistency of the application of the accounting principles, or as to any changes in such principles which have a material effect on the financial statements.

(d) *Exceptions.* Any matters to which the accountant takes exception shall be clearly identified, the exception thereto specifically and clearly stated, and, to the extent practicable, the effect of each such exception on the related financial statements given.

Id. § 210.2-02.

[108] 15 U.S.C. §§ 77(g), (j) (1976).

[109] 17 C.F.R. § 210.1-02(f) (1977).

[110] *Id.* § 210.2-02(c).

require an opinion to be expressed, a disclaimer of opinion is unacceptable, because such a disclaimer states that the auditor does not express an opinion on the financial statements.[111]

The effects of qualifications and footnote disclosures are considerably more complicated and can be broken down into a number of areas. The SEC dealt with qualifications and footnote disclosures due to departures from GAAP as early as 1938.[112] The SEC stated that financial statements that are prepared using accounting principles for which there is "no substantial authoritative support"[113] will be presumed to be misleading or inaccurate, notwithstanding full disclosure in the auditor's opinion or in the footnotes of the financial statements. Clearly, departures from GAAP should be avoided or, if the client refuses to comply, the auditor should disassociate himself from the financial statements.

A qualification arising due to limitations on the scope of an audit is a bit more involved. The SEC addressed this question in Accounting Series Release No. 90.[114] The question arose in the context of a "first time" audit exception taken by auditors.[115] The Commission noted that since it was impossible to physically verify beginning inventories in the first-time audit situation, GAAS do not require such verification. However, the Commission stated that alternative means should be employed to determine the accuracy of the inventories. If such alternative procedures are applied and the auditor is in a position to express an affirmative opinion, an exception due to a failure to physically verify beginning inventories should be unnecessary.[116] The principal restriction imposed by Accounting Series Release No. 90 is that qualifications due to material scope limitations on the audit are unacceptable in reports filed with the Commission.

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[111]*See* note 37 *supra*. *See also* SEC v. Beisinger Indus. Corp., 421 F. Supp. 691, 695 n.11 (D. Mass. 1976).

[112]Accounting Series Release No. 4, 5 FED. SEC. L. REP. (CCH) ¶ 72,005 (1938).

[113]"Substantial authoritative support" is the SEC's definition of GAAP. The SEC has traditionally left the promulgation of GAAP to the accounting profession. *See* Accounting Series Release No. 150, 5 FED. SEC. L. REP. (CCH) ¶ 72,172 (1973).

[114]Accounting Series Release No. 90, 5 FED. SEC. L. REP. (CCH) ¶ 72,112 (1962).

[115]GAAS require physical observation of inventories. A problem arises during a first-time audit because verification of beginning inventories is impossible when the auditor is not retained until year-end. *See* McKesson & Robbins, Inc., Accounting Series Release No. 19, 5 FED. SEC. L. REP. (CCH) ¶ 72,020 (1940).

[116]The SEC reasoned that the certificate must state whether the audit complied with GAAS and whether it included the necessary tests of accounting records. Accounting Series Release No. 90, 5 FED. SEC. L. REP. (CCH) ¶ 72,112 (1962) (construing 17 C.F.R. § 210.2-02(b)(1) (1961)). If the certificate contains this statement, a qualification due to failure to observe physical inventories is unacceptable and contradictory, since the auditor must have satisfied himself as to the accuracy of the inventories by some other means before he can certify that he complied with GAAS. *Id.*

For further treatment of scope limitations, *see* Accounting Series Release No. 62,

Uncertainties that cannot be resolved as of the statement date present another area where qualifications can arise. Uncertainties arising due to a need for additional financing were addressed in Accounting Series Release No. 115.[117] The auditor's report disclosed that, due to prior years' losses, continued operation of the business was in jeopardy unless additional financing could be obtained. A qualified opinion was issued, due to the need for additional funds to finance current operations.[118] The Commission found the financial statements defective, reasoning that rule 2-02[119] requirements regarding auditor's opinions are not satisfied where financial statements are prepared on a "going concern" basis and the auditor's opinion is so qualified as to indicate serious doubt as to whether such an assumption of "going concern" status is appropriate. Presumably, a qualification would be acceptable if the immediate threat to "going concern" status has been removed by a firm commitment of funds from such sources as banks or public offerings (if adequate funds are anticipated); however, this information should be disclosed in a separate explanatory paragraph. Accounting Series Release No. 115 renders "open ended" qualifications, such as "subject to obtaining additional financing," unacceptable to the SEC, at least if there is an immediate threat to continued operations without a commitment for such funds.[120]

Resource Corp. International[121] addressed a more generalized question regarding qualifications, namely, how extensive a qualification may be and still satisfy the requirements of the 1933 and 1934 Acts. Resource Corp. International was organized to acquire financing for the purchase of Mexican timberlands. The accountants who

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5 FED. SEC. L. REP. (CCH) ¶ 72,081 (1947); Barrow, Wade, Guthrie & Co., Accounting Series Release No. 67, 5 FED. SEC. L. REP. (CCH) ¶ 72,086 (1949) (SEC disciplinary proceeding pursuant to 17 C.F.R. § 201.2(e) (1977) initiated against auditors issuing a qualified opinion for failure to verify working process).

[117]Accounting Series Release No. 115, 5 FED. SEC. L. REP. (CCH) ¶ 72,137 (1970). For additional discussion regarding treatment of uncertainties arising in financial statements filed with the Commission, *see* Accounting Series Release No. 166, 5 FED SEC. L. REP. (CCH) ¶ 72,188 (1974); Accounting Series Release Interpretations, Topic 6(E), 5 FED. SEC. L. REP. (CCH) ¶ 74,151 at 62,843 (1974).

[118]*See* AICPA PROFESSIONAL STANDARDS, *supra* note 3, §§ 509.21-509.26, for the A.I.C.P.A. form and opinion content requirements.

[119]17 C.F.R. § 210.2-02 (1977), *reprinted in* note 107 *supra*.

[120]For a case dealing with uncertainties due to management's use of sales and cost reduction estimates in financial statements, *see* Accounting Series Release No. 173, 5 FED. SEC. L. REP. (CCH) ¶ 72,195 (1975). The case notes that the issuance of a qualified opinion due to uncertainties does not absolve the auditor from responsibility for performing adequate audit tests and obtaining documentation of management's assessment of the outcome of the uncertainty—at least in cases where the uncertainty is such that a reasonable assessment can be made.

[121]7 S.E.C. 689 (1940).

were retained to audit the corporation and prepare its SEC filing papers qualified their certificate extensively.[122] The SEC ruled that the auditor's certificate failed to satisfy the rule 2-02 requirements of a "certified" report[123] because the effect of the extensive qualification was that the accountants expressed an affirmative opinion as to only $35,000 of over $9,000,000 in total assets.[124] This ruling indicates that when a qualification is so pervasive as to effectively negate the overall affirmative opinion, the Commission will consider the financial statements to be uncertified and thus defective.

In *Associated Gas & Electric Co.*,[125] the SEC was called upon to determine the adequacy of financial statements and supporting auditor's opinions filed over a period of several years. The auditors' opinions contained incredibly complicated and verbose qualifications and footnote disclosures regarding the treatment of various items by Associated Gas.[126] In determining the adequacy of the disclosures,

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[122]The auditor's opinion was as follows:

> Investments in capital stocks of subsidiary companies and in Mexican timber tracts were recorded by the issuer on the basis of the liability ($1,650,000) which it agreed to assume and the value assigned by the board of directors ($7,350,000) to 735,000 shares of its capital stock issued in connection with the acquisition of these assets October 15, 1931. Mr. H.S. Hoover has represented that the cost to him of his equity in these assets for which he received 735,000 shares of capital stock was approximately $359,154. Subsequent to October 15, 1931, Mr. H.S. Hoover secured a reduction of $487,860, without cost to him, in the amount of the liabilities assumed by the issuer at that date and 52,536 additional shares of capital stock of the issuer were issued to him in connection therewith. The issuer in 1937 issued 68,542 shares of its capital stock to Mr. B.L. Hoover or his nominee at a declared value of $10 per share in settlement of $685,420 principal amount of purchase contract obligations acquired by him from vendors for a cash consideration of $217,700, which cash was advanced to him by Mr. H.S. Hoover. The issuer represents that Mr. B.L. Hoover is not an affiliated interest.
>
> The investments of the issuer in Mexican timber tracts, including those owned by subsidiaries, represent practically its sole assets. As auditors, it is not possible for us to make any determination of the value of such assets. Consequently we are not in a position to express an opinion with respect to the accompanying balance sheet that embraces the matter of value assigned therein to those assets and to the stated capital or the accounting principles followed in connection therewith. The remaining items on the issuer's balance sheet at November 30, 1937, together with supporting schedules referred to in connection therewith are, in our opinion, fairly stated thereon in accordance with accepted principles of accounting.

Id. at 739.

[123]17 C.F.R. § 210.2-02 (1977), *reprinted in* note 107 *supra*.

[124]7 S.E.C. at 739.

[125]11 S.E.C. 975 (1942).

[126]The opinions issued for a single year were too long to reproduce in a footnote; however, for those readers possessed of strong eyes or a magnifying glass, the opinions can be found in an appendix to the case. *Id.* at 1063 app.

the SEC examined each qualification and disclosure from two viewpoints: First, it examined each disclosure in detail for clarity, compliance with GAAP, and adequacy in relation to its purpose; and second, the Commission examined the financial statements as a whole to determine in light of all circumstances whether the statements conveyed all the required information in an understandable manner.[127] The Commission ultimately ruled that the financial statements did not meet the certification requirements and accordingly were defective. The most important point to be drawn from the case is the SEC's view that compliance with GAAP and A.I.C.P.A. disclosure requirements is not enough; rather, the information must also adequately inform the average investor.[128] The SEC noted that too many qualifications in the auditor's opinion may in some cases indicate that the scope of the audit was inadequate, thereby prohibiting the expression of an opinion or alternatively, as in *Resource Corp. International*, negating the overall opinion expressed.[129] In either case, the rule 2-02 requirements will not be satisfied.

The Commission, in *Thomascolor Inc.*,[130] elaborated on the requirements for adequate disclosures in financial statements. Thomascolor's business consisted of processing color films, and its principal assets were patents on a "new" color process (which was in fact old and filled with technical flaws). The central dispute in the SEC proceeding involved the valuation method applied to the patents and the adequacy of the disclosure of the patents' cost basis. Footnotes to the financial statements only partially disclosed the

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[127]"We believe that, in addition to the question whether the individual items of financial statements are stated in accordance with accounting principles, practices, and conventions, there must be considered the further question whether, on an overall basis, the statements are informative." *Id.* at 1059.

[128]*Id.* at 1058-59. A number of decisions have adopted this position in civil suits, as well as criminal prosecutions. *See, e.g.*, United States v. Simon, 425 F.2d 796 (2d Cir. 1969), *cert. denied*, 397 U.S. 1006 (1970); Baumel v. Rosen, 283 F. Supp. 128 (D. Md. 1968) (use of traditional installment method misleading); Herzfeld v. Laventhal, Krekstein, Horwath, & Horwath, 378 F. Supp. 112, 121 (S.D.N.Y. 1974), *aff'd*, 540 F.2d 27 (2d Cir. 1976) ("Our inquiry is properly focused not on whether [defendants'] report satisfies esoteric accounting norms, comprehensible only to the initiate, but whether the report fairly presents the true financial position of Firestone . . . to the untutored eye of an ordinary investor."). *See also* Touche, Niven, Bailey, & Smart, Accounting Series Release No. 78, 5 FED. SEC. L. REP. (CCH) ¶ 72,100, at 62,220 (1957) ("[A] public accountant whose duty it is to convey full information does not fulfill his obligtion by simply giving so much as is calculated to induce requests for more.").

[129]11 S.E.C. at 1062.

[130]27 S.E.C. 151 (1947). *See also* Accounting Series Release No. 73, 5 FED. SEC. L. REP. (CCH) ¶ 72,092, at 62,184 (1952) (SEC disciplinary proceeding against auditors of Thomascolor arising out of the above activities).

cost basis for valuing the patents. However, the SEC ruled that the disclosures were inadequate and that the patents were overvalued, due to inclusion of promotional costs in the cost basis of the patents.[131] Of significance is the SEC's view of footnote disclosures in the financial statements:

> It is not enough to say that here perhaps much (but by no means all) of the factual background forming the basis of the original patent and patent application account was given in footnote data. Significant data were not provided; but even if these had been given there is an obligation to present material in a way in which it will be useful to the informed but less sophisticated readers.[132]

It is by now apparent that the SEC not only requires qualifications to be understandable to the average reader, as was illustrated in *Associated Gas*, but also applies the same requirement to footnote disclosures.

Footnotes are also occasionally used to make certain types of disclosures where a qualification is deemed to be unwarranted, but some explanation is still needed.[133] In *F.G. Masquelette & Co.*,[134] an extreme example of this alternative use, the Commission brought a disciplinary proceeding[135] against Masquelette & Co. resulting from their audit of Health Institute, Inc., a corporation organized to erect and operate a hotel in Hot Springs, New Mexico. The corporation's principal asset, as of the filing date, was a leasehold (the site of the proposed hotel), which was valued at $100,000 on a completely arbitrary basis with no consideration of its market value. The auditors issued an unqualified opinion on the financial statements. The only disclosure regarding the leasehold was made in a note attached to the balance sheet in which the auditors disclosed that the leasehold value was arbitrary and based on the amount of stock issued in exchange for the leasehold.

The Commission ruled that the balance sheet did not present fairly the corporation's financial position in conformity with GAAP, since valuation of an asset based upon the par value of its stock does not comply with GAAP.[136] The Commission further stated that

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[131]27 S.E.C. at 169.

[132]*Id.* at 170 n.17.

[133]Occasionally the SEC requires the use of footnote disclosures. *See, e.g.*, Accounting Series Release No. 62, 5 FED. SEC. L. REP. (CCH) ¶ 72,081 (1947) (footnote explanations required under certain circumstances in summary earnings tables).

[134]Accounting Series Release No. 68, 5 FED. SEC. L. REP. (CCH) ¶ 72,087 (1949).

[135]17 C.F.R. § 201.2(e) (1977).

[136]Accounting Series Release No. 68, 5 FED. SEC. L. REP. (CCH) ¶ 72,087, at 62,181 & 62,183 n.4 (1949).

the footnote disclosure did not cure this deficiency and noted: "[E]ven were the footnote to state with complete frankness the true fact that the assets were over-valued, this would not mitigate the effect of the valuation figure itself. A balance sheet item which is flatly untrue will not be rendered true merely by admission of untruth."[137] Thus, auditors should not rely on footnote disclosures in place of a clear qualification and explanation as to the departure from recognized standards, particularly where the item is material and the departure is extreme.[138]

3. Judicial Treatment of Attempts at Limiting Liability Under Securities Laws.—Judicial response to auditors' attempts at limiting liability under the securities laws by qualification has been minimal.[139] The very limited number of reported cases tend, in general, to follow the common law treatment. *Herzfeld v. Laventhol, Kreskstein, Horwath & Horwath*[140] is illustrative of the current judicial attitude toward qualficiations and supporting footnote disclosures in the rule 10b-5[141] actions. Plaintiff Herzfeld was approached by representatives of Firestone Group Ltd., a California corporation primarily engaged in the purchase and resale of real estate, regarding a private placement of Firestone's securities. The focus of this suit (and the basis of plaintiff's allegations of materially misleading financial statements) was the accounting treatment given to two real estate transactions in the audited financial statements that were subsequently delivered to the plaintiff-purchaser. The transactions in question involved Firestone's purchase of twenty-three nursing homes for $13,362,000, with $5,000 payable during the statement year, and Firestone's contract to sell the same property to Continental Recreation Co. for $15,393,000, with $25,000 payable during the statement year. This purchase and resale represented the largest transaction ever entered into by Firestone.[142] Firestone wanted to recognize the entire profits of this proposed resale in the statement year so as to convert a $772,108 loss into a $1,257,892 gain with the obvious result of making their securities offering con-

[137]*Id.* at 62,180 (quoting Mining & Development Corp., 1 S.E.C. 786, 799 (1936)).

[138]The facts of this case clearly presented a situation requiring at least a qualified opinion. *See* AICPA PROFESSIONAL STANDARDS, *supra* note 3, § 509.29.

[139]A number of cases have dealt with the quality of footnote disclosures in financial statements. *See, e.g.*, Republic Technology Fund, Inc. v. Lionel Corp., 483 F.2d 540, 547 (2d Cir. 1973) (footnote disclosing overall interim profit picture should have been appended to financial statements); Kaiser-Frazer Corp. v. Otis & Co., 195 F.2d 838, 843 (2d Cir. 1952) (footnote should have disclosed that material increase in earnings was due to inventory adjustment during prior quarters); SEC v. Geotek, 426 F. Supp. 715 (N.D. Calif. 1976); Green v. Jonhop, Inc., 358 F. Supp. 413 (D. Ore. 1973).

[140]540 F.2d 27 (2d Cir. 1976).

[141]17 C.F.R. § 240.10b-5 (1977).

[142]Sales for 1969 including this transaction would have been $22,132,607, as opposed to $6,739,607 without its inclusion.

siderably more attractive. However, the defendant-accountants were hesitant to recognize the total gain on the resale agreement in the 1969 statement year primarily because of its questionable compliance with GAAP.[143] Accordingly, defendants reported $235,000[144] as gross profit and the balance of the "gain" as "deferred gross profit."[145] The income statement contained the following note regarding "deferred gross profit": "Of the total gross profit of $2,030,500, $235,000 is included in the Consolidated Income Statement and the balance, $1,795,500, will be considered realized when the January 30, 1970 payment is received. The latter amount is included in the deferred income in the consolidated balance sheet."[146] The auditors'

[143] *APB Statement No. 4, supra* note 4, ¶ 150, provides in part that revenues should not be recognized until the "earnings process is complete or virtually complete" and "an exchange has taken place." Firestone had paid $5,000 on a $13,200,000 purchase and had received $25,000 on a sales contract of $15,000,000. In addition, as of the statement date, the accountants were unsure as to whether certain conditions in both sales contracts had been satisfied.

[144] This figure was apparently arrived at by adding the $25,000 deposit, a $25,000 payment due in January 1970, and $185,000 liquidated damages for nonperformance.

[145] The term "deferred gross profit" is typically used in installment sales of realty to indicate the postponement of income recognition until installments are received. *See* D. KIESO, R. MOUTZ, & C. MOYER, INTERMEDIATE PRINCIPLES OF ACCOUNTING (1969); R. WIXON, W. KELL, & N. BEDFORD, ACCOUNTANTS' HANDBOOK (5th ed. 1970).

[146] 540 F.2d at 31. The full text of the note read as follows:

> The Firestone Group, Ltd. acquired by contract of sale a group of convalescent hospitals containing approximately 1,900 beds. The properties were leased back to the former owners. In November, 1969 the Company sold the properties by means of a contract of sale.
>
> The terms of the contract by which The Firestone Group, Ltd. purchased the properties provide for the following:

Assumptions of existing first trust deed liens	$ 5,822,283
Note payable, secured by second trust deed, requiring monthly amortization of principal and interest at 9¼% for 25 years	3,540,217
Cash:	
Upon contract execution	5,000
On December 20, 1969	25,000
On January 30, 1970	3,970,000
	$ 13,362,500

> The contract of sale provided for the following:

Assumption of existing trust deed liens	$ 9,362,500
Cash:	
Upon contract execution	25,000
On January 2, 1970	25,000
On January 30, 1970	4,965,250
Note secured by trust deed in favor of The Firestone Group, Ltd. requiring monthly amortization based on twenty-five years with interest of 8½%; final payment due in 120th month	1,015,250
	$ 15,393,000

opinion also contained the following qualification: "In our opinion, subject to collectibility of the balance receivable on the contract of sale (see note 4 of Notes to Financial Statements) the accompanying consolidated balance sheet and related consolidated statements of income and retained earnings present fairly the financial position of [Firestone] . . . ."[147]

A cover letter,[148] written by Firestone and attached to the financial statements sent to plaintiff, attempted to explain the breakdown of profit and deferred gross profit and offered any securities purchasers the right to rescind the sale if the audited financial statements caused a change in the decision to purchase. Plaintiff read the cover letter but did not read defendant's opinion or notes and decided not to exercise the right of rescission. Neither the purchase nor the sale of the nursing homes were completed, and one year later Firestone filed a petition for reorganization under the Bankruptcy Act.

In upholding a trial court verdict for plaintiff, the Second Circuit Court of Appeals ruled that the auditors' report was materially misleading. The report included the purchase-resale transaction without adequate disclosure of all material facts of the transaction, and the financial statements had been drafted to improperly recognize certain forms of income.[149] The court ruled that the

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The sales agreement also provides for liquidated damages of $185,000 if the buyer fails to perform.

Of the total gross profit of $2,030,500, $235,000 is included in the consolidated income statement and the balance, $1,795,500, will be considered realized when the January 30, 1970 payment is received. The latter amount is included in deferred income in the consolidated balance sheet.

378 F. Supp. 112, 124 (S.D.N.Y. 1974).

[147]540 F.2d at 31.

[148]The cover letter attached to the audited financial statement read as follows:

One transaction which is reflected in the November 30 audited financial statements has been treated as producing deferred gross profit rather than current gross profit. While the combination of current and deferred income is actually higher than projected ($1,411,557 as compared with $1,360,000 projected) the shift of $1,795,500 of gross profit on this transaction from a current basis to deferred basis by the auditors has reduced current net income below that originally projected. . . .

Deferred income shown on the audited balance sheet has been increased to $2,834,133 as against $1,421,000 projected. A breakdown of the components of the deferred income account is shown in the audited financial statements. . . .

If for any reason you find that the changes reflected in the audited financial statements are of a nature which would have resulted in a change in your investment decision, we will arrange to promptly refund to you your subscription payment.

Id. at 32.

[149]*Id.* at 35.

auditors' qualification was defective, due to a failure to include the true nature and circumstances of the purchase-resale transaction, failure to explain the basis for determining the $235,000 gain, and failure to adequately disclose the reasons for the qualification.[150] The court also noted that plaintiff's failure to read the notes or opinion was irrelevant because of their inadequate and deceptive character.[151] It is clear from *Herzfeld* that in an action arising under the securities laws the courts will demand a high degree of disclosure in qualifications and will closely scrutinize the opinion in light of surrounding transactions to determine if this standard has been met. In addition, although the *Herzfeld* court referred to A.I.C.P.A. standards on disclosure, the court judged the adequacy of the contested disclosure on its understandability to the average reader.[152]

4. Conclusion: Securities Laws.—Some general conclusions can be drawn regarding qualifications and disclaimers under the securities laws. It is fairly clear that the presence of a disclaimer of opinion in an auditor's report will render the filing defective under the securities laws. In general, qualifications and footnote disclosures arising from departures from GAAP are unacceptable, as are qualifications due to scope limitations and "open ended" qualifications due to need for additional financing. In any case, where extensive qualifications are present there is always a chance the SEC will treat the pervasiveness of the qualification as negating the overall affirmative opinion or will possibly raise questions as to the adequacy of the audit. Qualifications and footnote disclosures should not be relied upon to rectify clearly inadequate or misleading

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[150]The district court listed ten items which, in its opinion, should have been disclosed in order to eliminate the misleading nature of the statements. 378 F. Supp. at 125-26. The court of appeals disagreed, ruling that the principal flaw in the financial statements was the recordation of the purchase-resale transaction as complete during fiscal year 1969. 540 F.2d at 37. The court also noted that the explanatory paragraph of the auditors' opinion failed to meet minimum A.I.C.P.A. standards. The court cited A.I.C.P.A., STATEMENTS ON AUDITING PROCEDURE, *AICPA Statement No. 33*, at 16 (1963), *reprinted in* AICPA PROFESSIONAL STANDARDS, *supra* note 3, § 509.32, as requiring complete disclosure of the reasons for the qualification. The court noted that this requirement could have been easily satisfied and suggested that the following disclosure would have been sufficient: "Agreements for the purchase of Monterey Nursing Inns, Inc. for $13,362,500 and the sale thereof to Continental Recreation, Inc. for $15,393,000, have been executed. When, as and if these transactions are consummated, FGL expects to realize a profit of $2,030,500." 540 F.2d at 36.

[151]540 F.2d at 37.

[152]"[I]nvestors [should] be provided 'with all the facts needed to make intelligent investment decisions [which] can only be accomplished if financial statements fully and fairly portray the actual financial condition of the company.'" *Id.* at 32-33 (quoting the district court).

disclosures made in the financial statements. When evaluating qualifications and footnote disclosures, both the SEC and the courts will consider not only whether the minimum standards of the accounting profession have been met, but also whether the financial statements as a whole are useful to the average reader. Thus, auditors should attempt to draft clear opinions and footnotes in order to avoid ambiguous or inconsistent statements. If any general formulation can be made regarding the required contents of a qualification in an auditor's report filed with the SEC, such a check list would require the qualification to be specific and readily understandable, presenting every reason for the qualification as accurately and completely as circumstances permit.

III. Conclusion

As the foregoing materials indicate, it is possible for an auditor to limit his liability. It should also be clear that the auditor must walk a tightrope of adequate disclosure. He must balance the reader's interests in fair disclosure and understandability against his client's interests in showing results of operation and changes in financial position in the most favorable light possible. The guiding factor in striking this balance is the auditor's evaluation of the ultimate impact of each problem area on the client's financial condition. This standard necessarily involves judgment calls, and errors do occur. Additionally, the auditor should be aware that courts will closely scrutinize attempted limitations on liability. They will evaluate the adequacy of disclosures with the benefit of hindsight, looking for not only technical compliance with professional standards, but also compliance with the more practical standards of usefulness and understandability to the average reader.

Michael P. Lucas

The Pre-emption Doctrine and the Commodity Futures Trading Commission Act: In Favor of State Law

In 1974, President Ford signed into law the Commodity Futures Trading Commission Act of 1974[1] (CFTC Act), which amended the Commodity Exchange Act[2] by providing in part that the newly formed Commodity Futures Trading Commission (CFTC) shall have

> exclusive jurisdiction with respect to accounts, agreements . . . and transactions involving contracts of sale of a commodity for future delivery, traded or executed on a contract market . . . ; *And provided further*, That, except as hereinabove provided, nothing contained in this section shall (i) supersede or limit the jurisdiction at any time conferred on the Securities and Exchange Commission or other regulatory authorities under the laws of the United States or of any State, or (ii) restrict the Securities and Exchange Commission and such other authorities from carrying out their duties and responsibilities in accordance with such laws.[3]

Thereafter, in 1975, an Indiana securities law amendment included commodity futures contracts in its definition of a security,[4] thereby requiring registration of commodity futures and commodity futures brokers with the Indiana Securities Commission.[5]

Because section 201(b) of the CFTC Act refers only to "transactions" involving commodity futures, and because the Act contains no other provision for the registration of a commodity futures broker-dealer with the CFTC, the question arises as to whether the CFTC has totally pre-empted the SEC and state authorities from the field of commodity futures, or whether the states can enforce

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[1]Pub. L. No. 93-463, 88 Stat. 1389 (1974) (amending 7 U.S.C. §§ 1-22 (1970 & Supp. III 1973)).

[2]7 U.S.C. §§ 1-22 (1970 & Supp. III 1973) (amended 1974). For a discussion of the changes made in the Commodity Exchange Act, *see* Johnson, *The Changing Face of Commodities Regulation*, 20 PRAC. LAW., Dec. 1974, at 27; Johnson, *The Commodity Futures Trading Commission Act: Preemption as Public Policy*, 29 VAND. L. REV. 1 (1976); Rainbolt, *What the New Commodity Futures Trading Commission Means to You*, COMMODITIES, Feb. 1975, at 23-26; Note, *The Role of the Commodity Futures Trading Commission Under the Commodity Futures Trading Commission Act of 1974*, 73 MICH. L. REV. 710 (1975).

[3]7 U.S.C. § 2 (1976).

[4]"'Security' means any . . . commodity futures contract; option, put, call, privilege or other right to purchase or sell a commodity futures contract; margin accounts for the purchase of commodities or commodity futures contracts . . . ." IND. CODE § 23-2-1-1(k) (Supp. 1977).

[5]*Id.* § 23-2-1-8.

their own laws regarding registration of commodity futures and commodity futures brokers.

I. Formulation of a Pre-emption Doctrine

The problem of pre-emption has long been a perplexing one;[6] and as many areas such as education (segregation), welfare, and the sharing of federal revenues acquire a national rather than local dimension, the question of where to draw the line between federal and state authority continues to be a problem. The primary source of the pre-emption doctrine is found in the supremacy clause of the United States Constitution,[7] with the purpose of pre-emption being either to effectuate a congressional occupation of a particular field, even where the federal regulatory scheme does not occupy the entire field, or to nullify state regulation in conflict with federal legislation. The Supreme Court has yet to develop a uniform approach to pre-emption;[8] although many rules have been promulgated for determining whether there should be pre-emption, the formulas are vague and lend themselves to a wide range of interpretation and discretion. For example, in *Kelly v. Washington*,[9] the Supreme Court determined that the "exercise by the State of its police power, which would be valid if not superseded by federal action, is superseded only where the repugnance or conflict is so 'direct and positive' that the two acts cannot 'be reconciled or consistently stand together.'" According to the Supreme Court's decision in *Hines v. Davidowitz*,[10] pre-emption occurs when a state statute interferes with the "accomplishment and execution of the full purposes and objectives of [an Act of] Congress."[11] More specifically,

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[6]Preemption occurs when a state statute obstructs the "accomplishment and execution of the full purposes and objectives of an Act of Congress." More specifically, either a congressional design to "occupy the field" or a conflict between federal and state statutes is needed to place a statute in an unconstitutionally obstructive position.

Note, *The Preemption Doctrine: Shifting Perspectives on Federalism and the Burger Court*, 75 Colum. L. Rev. 623, 624 (1975). For further discussion of the pre-emption doctrine, *see* Freeman, *Dynamic Federalism and the Concept of Preemption*, 21 De Paul L. Rev. 630 (1972); Note, *Pre-emption as a Preferential Ground: A New Canon of Construction*, 12 Stan. L. Rev. 208 (1959).

[7]U.S. Const. art. VI, cl. 2, provides:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

[8]*See* Note, *The Preemption Doctrine: Shifting Perspectives on Federalism and the Burger Court*, 75 Colum. L. Rev. 623, 624 (1975).

[9]302 U.S. 1, 10 (1937).

[10]312 U.S. 52 (1941).

[11]*Id.* at 67.

either a congressional intent to "pre-empt the field" or a conflict between federal and state statutes[12] is needed before a state statute must defer to federal law under the pre-emption doctrine.

A congressional intent to occupy the field supersedes the operation of state law on federally regulated subject matter regardless of whether the state regulation impairs the actual operation of the federal law. Thus, a finding of congressional occupation must be preceded by a showing that it is "the clear and manifest purpose of Congress" that an area be exclusively federally regulated.[13] However, the Supreme Court has not relied exclusively upon expressions of congressional purpose or specific intent in determining the scope of pre-emption based on grounds of federal occupation of the field.[14]

Furthermore, the Court may take into consideration factors outside the language of the federal legislation in determining whether pre-emption exists. For example, the nature of the subject matter being regulated may reveal a need for nationwide uniformity[15] that would preclude the separate states from entering the field. Consideration of these factors parallels those factors taken into account in the early cases under the commerce clause.[16] Those cases categorized certain subject matter as national in character and thus preemptive, regardless of congressional action; other subject matters are characterized as inherently local in nature and thus subject to regulation by the individual states. However, this approach does not present a definite rule for determining pre-emption, because subject matter has not been treated in a uniform manner by the courts and hence is not considered determinative of pre-emption independent of congressional intent.[17]

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[12]Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 141 (1963).

[13]*Id.* at 146.

[14]In Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947), the Court stated that pre-emption is favored if the scheme of federal regulation is "so pervasive *as to make reasonable the inference* that Congress left no room for the States to supplement it," or if State policy would produce a result inconsistent with the objective of the federal statute. *Id.* at 230 (emphasis added).

[15]*See, e.g.*, Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963).

[16]*See, e.g.*, Cooley v. Board of Wardens, 53 U.S. (12 How.) 298 (1851).

[17]In both Florida Lime & Avocado Growers v. Paul, 373 U.S. 132 (1963), and Head v. New Mexico Bd. of Examiners, 374 U.S. 424 (1963), the Court characterized the subject matter as local, then went on to determine whether Congress intended to occupy the fields at issue. This is a curious result because if the Court has characterized a certain subject matter as local for commerce clause purposes, Congress may nevertheless enter the field; however, for pre-emption purposes, if Congress has acted in the field, albeit short of complete occupation, the Court must disregard Congress' determination that the subject matter is national in character in order to find pre-emption. *See* 75 COLUM. L. REV. 623, 625 n.18 (1975).

When using conflict between federal and state statutes as grounds for pre-emption,[18] the Court first analyzes the statutes in question, then determines whether a conflict actually exists.[19] The clearest cases arising on grounds of conflict occur when state law mandates action forbidden by federal law, or vice-versa.

During the 1930's, the Supreme Court shifted the burden of establishing pre-emption onto Congress rather than engaging in its own assessment as to whether pre-emption had occurred.[20] Under that approach, absent an actual conflict between federal and state law, pre-emption could occur only if congressional intent to occupy the field was "definitely and clearly" shown.[21] Although it appeared that the Court favored a specific expression of intent, the Court never articulated the elements that would satisfy the burden of proving pre-emption. Moreover, if congressional language was not specific, the Court itself proceeded to ascertain the purposes of the legislation. If the purposes necessarily implied federal supremacy, the inconsistent state law was struck down.[22]

In *Rice v. Santa Fe Elevator Corp.*,[23] the Court attempted to sharpen this intent standard. In an earlier decision, *Cloverleaf Butter Co. v. Patterson*,[24] the Court invalidated a state regulation overlapping a federally regulated field but also occupying an aspect untouched by the congressional scheme.[25] In *Rice*, the Court stated three instances in which the doctrine of pre-emption should be in-

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[18]It should be noted that occupation of the field and conflicting statutes are not easily separated as grounds for pre-emption. In addition, the Court does not always point out precisely which ground it is using before proceeding with its determination as to whether pre-emption exists.

[19]Perez v. Campbell, 402 U.S. 637, 644 (1971).

[20]Prior to 1930, the Court invoked the doctrine of pre-emption in any case where there was mere presence of congressional regulation in a particular field. *See, e.g.*, Charleston & W. Carolina Ry. Co. v. Varnville Furniture Co., 237 U.S. 597 (1915). The view was that the very exercise of federal power inherently excluded concurrent yet compatible regulation by the states.

Whether Congress or the Supreme Court should determine if pre-emption has occurred has in itself been a source of conflict. The Court resolves conflicts as to the allocation of power in the federal system pursuant to the "necessary and proper" clause, U.S. CONST. art. I, § 8, cl. 18, thereby making it doubtful that Congress should be able to conclusively pre-empt state law in any area. The framers of the Constitution intended the Supreme Court to determine where the line should be drawn when state and federal laws are in conflict. THE FEDERALIST No. 39. (J. Madison).

[21]Mintz v. Baldwin, 289 U.S. 346, 350 (1933).

[22]Nash v. Florida Indus. Comm'n, 389 U.S. 235 (1967); David v. Elmira Sav. Bank, 161 U.S. 275 (1896).

[23]331 U.S. 218 (1947).

[24]315 U.S. 148 (1942).

[25]The contested Alabama statute authorized confiscation and destruction or sale of packing stock butter that did not conform to state standards, ALA. CODE tit. 2, § 495 (1940), but the federal regulatory scheme had no parallel provision.

voked. First, the scheme of federal regulation may be "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it."[26] This determination requires an investigation of congressional intent, and deference should be given to this intent because Congress is better equipped than the judiciary to make fact-finding inquiries. Second, the act of Congress "may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject."[27] This is a matter of constitutional law, and does not defer to statutory interpretation. Finally, "the object sought to be obtained by the federal law and the character of obligations imposed by it"[28] may be such that pre-emption is required.

Thus, *Rice* requires the courts to weigh the federal and state interests at stake and decide which should control, but the decision must be tempered by the extent to which Congress has manifested an intention to control the field. Congressional intent in itself is an inadequate source for deciding pre-emption questions, because as a rule Congress does not consider the impact of its legislation with respect to state law.[29] The *Rice* approach has expanded the judiciary's role in pre-emption cases and has resulted in increased findings of the existence of pre-emption, a trend seemingly related to the concurrent decline in states' rights and interests.[30]

Even before its decision in *Rice*, the Court indicated that it would lower the intent requirement and engage in a presumption in favor of federal interests rather than state interests. In *Hines v. Davidowitz*,[31] the Court for the first time applied pre-emption to

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[26]331 U.S. at 230.

[27]*Id.*

[28]*Id.*

[29]During the course of legislative debate, congressmen often make statements concerning their own intent, but such statements often merely reflect their failure to anticipate the impact federal law will have on state law. For example, in Pennsylvania v. Nelson, 350 U.S. 497, 504 (1956), the Court found that Congress clearly intended to occupy the field of sedition, even though Congressman Howard Smith had flatly denied in debate that Congress ever intended to deprive the states of their concurrent jurisdiction. Note, *Pre-emption as a Preferential Ground: A New Canon of Construction*, 12 STAN. L. REV. 208, 208 n.4 (1959).

[30]Between 1868 and 1920, the Court decided 195 cases involving the exercise of police power by the states. In 93% of those cases the power was upheld, while the remaining 7% declared such power to be unconstitutional. From 1921 to 1927, state action was upheld in 72% of the 53 cases considered. Between 1930 and 1941, the Hughes Court only upheld state law in 60% of the cases considered, while the Vinson Court decided 49% of its cases in favor of state power. The Stone Court upheld 41% of the cases in favor of state law, and the Warren Court decided only 32% of the cases in support of the states. R. ROETTINGER, THE SUPREME COURT AND STATE POLICE POWER: A STUDY IN FEDERALISM 18, 195-206 (1957).

[31]312 U.S. 52 (1941). The issue was whether the Alien Registration Act of 1940, which required aliens to register with the federal government and carry identification

legislation that was not dependent on the commerce clause. Justice Black established a presumption in favor of the federal law's pre-emptive capability because the statute belonged to "that class of laws which concern the exterior relation of this whole nation with other nations"[32] and was "so intimately blended and intertwined with the responsibilities of the national government" as to present on its face a complete scheme of regulation in the field, precluding the states from participation in the field.[33] The decision amounted to a capability of finding pre-emption even where clear congressional intent to occupy the field or actual conflict of state and federal laws was lacking, so long as the nature of the federal regulation called for exclusive operation.

Subsequent cases in the area of foreign affairs also brushed over the intent requirement and pre-empted state regulation on the strength of a presumption in favor of federal interests.[34] The Court's assumption of pre-emptive authority, coupled with the relaxed intent standard, permitted pre-emption in areas formerly unreachable without a clear congressional intent;[35] with this propensity to find pre-emption came an impairment of the balance between federal and state interests.

Although the Court seems to have become firmly entrenched in its attitude toward pre-emption, the recent case of *Goldstein v. California*[36] may indicate a changing attitude in favor of state interests. In *Goldstein*, the Court upheld a California statute making record piracy a criminal offense[37] and rejected the argument that even though federal copyright law is silent on the matter of protection afforded recordings, concurrent state legislation could not stand.[38] Basing its decision on commerce clause cases that distin-

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cards, pre-empted a Pennsylvania statute with a similar registration procedure but more extensive criminal sanctions. The federal act only imposed criminal sanctions upon failure to register, while the Pennsylvania act did so upon the alien's failure to have the registration card in his possession. The 1940 federal act was repealed and replaced by the Act of June 27, 1952, 8 U.S.C. §§ 1301-1306 (1976).

[32]312 U.S. at 66 (citing Henderson v. Mayor of New York, 92 U.S. 259, 273 (1875)).

[33]312 U.S. at 66.

[34]*See* Graham v. Richardson, 403 U.S. 365 (1971); Zschernig v. Miller, 389 U.S. 429 (1968); Kolovrat v. Oregon, 366 U.S. 187 (1961); United States v. Pink, 315 U.S. 203 (1942).

[35]*See, e.g.*, Hamm v. City of Rock Hill, 379 U.S. 306 (1964) (civil rights); Farmers Educ. & Coop. Union v. WDAY, Inc., 360 U.S. 525 (1959) (communications); Pennsylvania v. Nelson, 350 U.S. 497 (1956) (civil liberties).

[36]412 U.S. 546 (1973).

[37]CAL. PENAL CODE § 653h (West 1970) (amended 1975 & 1977).

[38]The United States Constitution grants to Congress the power to protect the "Writings" of "Authors." 412 U.S. at 561 (quoting U.S. CONST. art. I, § 8, cl. 8). Although the term "Writings" has not been strictly construed, the above-mentioned enabling provision of the Constitution "does not require that Congress act in regard to

guished between local and national subject matter,[39] the Court ruled that federal law should govern when the exercise of a similar power by the states would be "absolutely and totally contradictory and repugnant."[40] The test for determining repugnancy is a flexible one: Federal law will be pre-emptive if and only if the matter is "necessarily national in import" and a conflict would "necessarily" arise if state law were allowed to stand.[41]

The broad interpretation the Court gave to "necessarily national" in *Goldstein* can be appreciated only after considering that sound recordings are a subject matter that is not purely local in character. The Court thus deferred to state interests that could be considered to have national impact and ignored a possible federal interest in uniform copyright laws. In so doing, the Court has essentially allowed state law to stand in the absence of federal action, leaving the door open for Congress to later act in that field.[42]

Goldstein is also significant in light of two previous cases involving the extent to which federally unpatentable articles may be protected by state unfair competition laws. In *Sears, Roebuck & Co. v. Stiffel Co.*[43] and *Compco Corp. v. Day-Brite Lighting, Inc.*,[44] the Supreme Court unanimously determined that federal patent law preempted any state unfair competition law protecting articles eligible, but unqualified, for a federal patent. The Court interpreted the

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all categories which meet the constitutional definition. Rather, whether any specific category of 'Writings' is to be brought within the purview of the federal statutory scheme is left to the discretion of Congress." 412 U.S. at 562. The Register of Copyrights, who is charged with administration of the federal copyright statute, ruled in 1959 that "claims to exclusive rights in mechanical recordings . . . or in the performances they reproduce" were not entitled to protection under the then-applicable copyright statute, 17 U.S.C. § 4 (1970). 24 Fed. Reg. 4958 (1959), *cited in* Goldstein v. California, 412 U.S. at 568. *But cf.* 37 C.F.R. §§ 202.8(b), .15a (1977) (implements registration of copyright claims in sound recordings pursuant to the 1971 amendments to and the 1976 revision of the Copyright Act).

Petitioners in *Goldstein* had been involved in "unauthorized duplication of recordings of performances by major musical artists." 412 U.S. at 549. They argued that the state statute they had violated established a copyright of unlimited duration, thereby conflicting with the above-mentioned clause of the United States Constitution. They also asserted that "the state statute interfered with implementation of federal policies inherent in federal copyright statutes." 412 U.S. at 551.

[39]Cooley v. Board of Wardens, 53 U.S. (12 How.) 299, 319 (1851); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 195 (1824).

[40]412 U.S. at 553 (quoting THE FEDERALIST No. 32 (A. Hamilton) at 241 (B. Wright ed. 1961)).

[41]412 U.S. at 554.

[42]After *Goldstein* was filed, legislation that extended federal copyright protection to sound recordings became effective. Pub. L. No. 92-140, § 1(a), (b), 85 Stat. 391 (1971) (subsequently codified at 17 U.S.C. §§ 1(f), 5(n) (Supp. I 1971)).

[43]376 U.S. 225 (1964).

[44]376 U.S. 234 (1964).

copyright and patent statutes as requiring (rather than permitting) national uniformity.[45] However, in *Goldstein*, the Court used an interstate commerce rationale[46] rather than a copyright basis with which to break precedent, thereby distinguishing *Sears* and *Compco*, in determining that states are entitled to give protection to copyright claims not qualifying for federal protection.[47] The commerce clause cases allowed pre-emption only where the subject matter was *necessarily* national in import.[48] By using these cases as the basis for decision in *Goldstein*, the Court set up a pre-emption requirement analogous to that of specific intent.

Although *Goldstein* only hinted at a return to the specific congressional intent standard, the subsequent decision in *New York State Department of Social Services v. Dublino*[49] made that requirement more explicit:

> If Congress is authorized to act in a field, it should manifest its intention clearly. It will not be presumed that a federal statute was intended to supersede the exercise of the power of the state unless there is a clear manifestation of intention to do so. The exercise of federal supremacy is not lightly to be presumed.[50]

In *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware*,[51] the Court considered an issue not dealt with in *Dublino*—whether the state and federal laws were in conflict.[52] The issue on appeal in

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[45]*Id.* at 231 & n.7. "Just as a State cannot encroach upon the federal patent laws directly, it cannot, under some other law, such as that forbidding unfair competition, give protection of a kind that clashes with the objectives of the federal patent laws." *Id.* at 231.

[46]Cooley v. Board of Wardens, 53 U.S. (12 How.) 299 (1851); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824).

[47]The Court relied on *Cooley* and *Gibbons*, both of which distinguished between matters local and national in character, and determined that exclusive federal power existed only if a matter was necessarily national in import.

[48]412 U.S. at 554, 568.

[49]413 U.S. 405 (1973).

[50]*Id.* at 413 (quoting Schwartz v. Texas, 344 U.S. 199, 202-03 (1952)).

[51]414 U.S. 117 (1973).

[52]Because the Court remanded the case on the issue of whether there was a conflict between the two laws, it was never decided if the New York Work Rules' termination penalty conflicted with the requirements of the Social Security Act. Those Work Rules require employable welfare recipients to pick up their checks in person, to certify the unavailability of employment, and to report for public works employment, job interviews, and any employment obtained therefrom. Failure to meet these requirements results in termination of welfare payments. N.Y. SOC. SERV. LAW § 131(4) (McKinney Supp. 1974).

Under the Work Incentive Program (WIN) of the Social Security Act, 42 U.S.C. §§ 630-644 (1976), the certification requirements are less strict, the termination penalty is omitted, and there are extensive procedural safeguards. *Cf.* 42 U.S.C. § 602(a)(8), (19)

Ware centered around a conflict between a California law requiring its courts to disregard certain arbitration clauses in controversies concerning due but unpaid wages,[53] and a New York Stock Exchange Rule[54] requiring arbitration of controversies arising out of employment termination. In upholding the state law, the Court noted that since the congressional purpose in allowing the exchanges to regulate themselves was "to insure fair dealing and to protect investors,"[55] the exchanges' rules should pre-empt conflicting state law "only to the extent necessary to protect the achievement of the aims of the Securities Exchange Act."[56] Because the federal arbitration rule did nothing to further the objectives of the Securities Exchange Act[57] and because the state law did not obstruct the objectives of the federal securities law,[58] the alleged conflict was held to be insignificant. Hence, the Court allowed the state law to stand, although it admittedly conflicted with federal law.

These recent decisions demonstrate the Court's renewed interest in favoring state law, even where it possibly conflicts with federal law. However, the Court has also indicated that it will not presume in favor of state law in every case.[59] Because of the Court's

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(1976) (federal criteria for state programs providing aid to needy families with children).

However, the Court intimated as to its treatment of the conflict problem, stating: "Where coordinate state and federal efforts exist within a complementary administrative framework, and in the pursuit of common purposes, the case for federal pre-emption becomes a less persuasive one. 413 U.S. at 421.

[53]The state court utilized this statute in declaring an employment contract provision requiring arbitration of termination disputes to be ineffective. Ware v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 24 Cal. App. 3d 35, 45, 100 Cal. Rptr. 791, 798 (1972) (citing CAL. LAB. CODE § 229 (West 1971)), *aff'd*, 414 U.S. 117 (1973). The controversy initially arose over the employer's assertion that the petitioner-employee had forfeited his rights under an employment contract to the benefits of a noncontributory profit-sharing plan when he voluntarily left his job in favor of other competitive employment. The state court relied on a restraint-of-trade statute in declaring the forfeiture provision of the employment contract void. 24 Cal. App. 3d at 43-44, 100 Cal. Rptr. at 796-97 (citing CAL. BUS. & PROF. CODE § 16600 (West 1964)).

[54]NEW YORK STOCK EXCHANGE, CONSTITUTION AND RULES, Rule 345 (a) (1) (CCH 1973).

[55]414 U.S. at 130.

[56]*Id.* at 127 (quoting Silver v. New York Stock Exchange, 373 U.S. 341, 361 (1963)).

[57]*Id.* at 134-36 (citing the Securities Exchange Act of 1934, 15 U.S.C. §§ 78a-78kk (1976)).

[58]414 U.S. at 139-40.

[59]In Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624 (1973), the Court found a federal aviation regulation to be pre-emptive of Burbank's curfew on late night flights.

> The Court reasoned that if local "airspace management" were preempted by the Federal Aviation Act of 1958, as amended by the Noise Control Act of 1972, then by definition local noise pollution regulation had also been preemp-

past reluctance to confine its pre-emption decisions within strict guidelines, it would be unreasonable to formulate a general rule concerning future pre-emption cases, especially in light of the trend indicated by *Goldstein*, *Dublino*, and *Ware*. However, these recent cases do suggest that where Congress has failed to articulate a specific intent to pre-empt or where a conflict between state and federal law either has not yet arisen or is insignificant, state law will be allowed to stand.

II. Application of the Doctrine to the Commodity Futures Trading Commission Act

The best indicator that pre-emption will be favored is a clear expression of congressional intent that the federal legislation is to supersede any state legislation in the field. An examination of the legislative history of the Commodity Futures Trading Commission Act, however, leaves unanswered many questions concerning congressional intent.

In 1973, the House Committee on Agriculture began a series of hearings to consider possible improvements to the Commodity Exchange Act. At that time, the chairman of the Chicago Board of Trade[60] expressed a desire that the commodity regulatory agency have exclusive jurisdiction over futures trading.[61] After hearing testimony both for and against exclusive jurisdiction,[62] the House introduced H.R. 13113,[63] a bill intended to clarify any jurisdictional

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ted. "Airspace management" was defined as the complete and ultimate regulation of flights and of the use of navigable airspace.

Comment, City of Burbank v. Lockheed Air Terminal, Inc.: *Federal Preemption of Aircraft Noise Regulation and the Future of Proprietary Restrictions*, 4 N.Y.U. Rev. L. & Soc. Change 99, 104 (1974). Despite the lack of any express language for pre-emption in the 1972 Act, Justice Douglas found that "the pervasive nature of the scheme of federal regulation of aircraft noise . . . leads us to conclude that there is pre-emption." 411 U.S. at 633.

[60]The Chicago Board of Trade is one of 12 organized commodity exchanges. The others include Chicago Mercantile Exchange; Mid-America Commodity Exchange (Chicago); Kansas City Board of Trade; Minneapolis Grain Exchange; New York Cocoa Exchange; New York Coffee and Sugar Exchange; Commodity Exchange, Inc. (New York); New York Cotton Exchange and Associates; New York Mercantile Exchange; Pacific Commodity Exchange (San Francisco); West Coast Commodity Exchange (Los Angeles).

[61]*Review of Commodity Exchange Act and Discussion of Possible Changes: Hearings Before the House Comm. on Agriculture*, 93d Cong., 1st Sess. 128 (1973).

Futures markets offer trading in cocoa, coffee, copper, foreign currency, and other areas; however, Congress only included specific farm items in the definition of "commodity." 7 U.S.C. § 2 (1976).

[62]*Commodity Futures Trading Commission Act of 1974: Hearings on H.R. 11955 Before the House Comm. on Agriculture*, 93d Cong., 2d Sess. (1974).

[63]H.R. 13113, 93d Cong., 2d Sess., 120 Cong. Rec. 10752 (1974).

questions that had previously arisen.[64] However, the bill only aggravated the situation; it contained a "saving" clause protecting the jurisdiction of the SEC and other federal agencies:

> *Provided*, that the [CFTC] shall have exclusive jurisdiction of transactions dealing in, resulting in, or relating to contracts of sale of a commodity for future delivery, traded or executed on a domestic board of trade or contract market or on any other board of trade, exchange, or market: *And provided further*, That nothing herein contained shall supersede or limit the jurisdiction at any time conferred on the Securities Exchange Commission [*sic*] or other regulatory authorities under the laws of the United States or restrict the Securities and Exchange Commission and such other authorities from carrying out their duties and responsibilities in accordance with the laws of the United States.[65]

In a subsequent report, the House Committee sought to reconcile this jurisdictional language by stating that the retention of jurisdiction by other agencies was limited to areas other than futures trading on a contract market.[66] The issue was not reconciled, however, until the Senate Committee proposed that the language "except as hereinabove provided"[67] be inserted between the clause giving the CFTC exclusive jurisdiction and the clause retaining some jurisdiction for other regulatory agencies.[68] As indicated in the report prepared by the Senate Committee on Agriculture and Forestry, the Senate version of H.R. 13113 was intended to clarify the House's professed intent that the CFTC be vested with exclusive jurisdiction.[69] In addition, the Senate Committee added language that extended the CFTC's exclusive jurisdiction to "ac-

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[64]*Commodity Futures Trading Commission Act: Hearings on H.R. 13113 Before the Senate Comm. on Agriculture & Forestry*, 93d Cong., 2d Sess. (1974).

When commodity futures expanded into a billion-dollar industry in the early 1970's, the Commodity Exchange Commission and the Secretary of Agriculture, federal watchdogs of the industry, found themselves unable to regulate a number of nonfood items that had been introduced for trading into the predominantly agricultural futures markets. Trading scandals arose, and efforts to centralize supervision of the various futures markets into one agency culminated in the CFTC Act.

[65]*Id.* at 140-41.

[66]H.R. REP. NO. 93-975, 93d Cong., 2d Sess. 37 (1974).

[67]7 U.S.C. § 2 (1976).

[68]S. REP. NO. 93-1131, 93d Cong., 2d Sess. 54, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 5843, 5870. *See* note 3 *supra* and accompanying text.

[69]S. REP. NO. 93-1131, 93d Cong., 2d Sess. 6, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 5843, 5848.

counts" and "agreements,"[70] as well as "transactions" for future delivery on a contract market.[71]

Thus, the Senate Committee's intent was to explicitly define the scope of the CFTC's exclusive jurisdiction and to insure the CFTC's actual and exclusive jurisdiction in those areas. However, when the Committee took its "clarified" version of H.R. 13113 to the floor for debate, Committee Chairman Herman Talmadge delivered a prepared statement that only confused the matter:

> In establishing this Commission, it is the committee's intent to give it exclusive jurisdiction over those areas delineated in the act. This will assure that the affected entities—exchanges, traders, customers, et cetera—will not be subject to conflicting agency rulings. However, it is not the intent of the committee to exempt persons in the futures trading industry from existing laws or regulations such as the antitrust laws, nor for the Commodity Futures Trading Commission to usurp powers of other regulatory bodies such as those of the Federal Reserve in the area of banking or the Securities and Exchange Commission in the field of securities.[72]

On its face, this statement did not reflect the language of the Senate bill but instead conflicted with the contents of H.R. 13113.

When the House and Senate versions went to conference committee, the Senate version prevailed except in one respect—the conference report struck section 402(d) from the Senate version,[73] which formerly provided: "Nothing in [section 4c] or section 4b shall be construed to impair any state law applicable to any transaction enumerated or described in such sections."[74] With that exception, the Senate version of H.R. 13113 was signed into law on October 24, 1974.[75]

In light of the confusing legislative history of the CFTC Act, it is necessary to determine whether the end result reflects Congress' voiced intent to pre-empt any state law dealing with subject matter coming under the CFTC's jurisdiction. Under section 2(a) of the Act,[76] agencies other than the CFTC are expressly excluded from regulating in the field of commodity futures; but because such an ef-

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[70] *Id.*

[71] *Id.* at 54, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 5843, 5870.

[72] 120 CONG. REC. 30459 (1974) (remarks of Sen. Talmadge).

[73] H.R. REP. NO. 93-1383, 93d Cong., 2d Sess., *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 5894.

[74] *Id.* at 35, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 5897.

[75] Pub. L. No. 93-463, 88 Stat. 1389 (1974) (amending 7 U.S.C. §§ 1-22 (1970 & Supp. III 1973)).

[76] 7 U.S.C. § 2 (1976). *See* note 3 *supra* and accompanying text.

fort was made to insert explicit language into the Act, the conclusion can be drawn that if a subject is not mentioned in the Act, it does not come under the CFTC's exclusive jurisdiction. Therefore, even though Chairman Talmadge's remarks on the Senate floor indicate the possibility that *persons* dealing in comodity futures would be subject to the CFTC,[77] no part of the Act itself suggests that brokers are included in "accounts," "agreements," or "transactions" to be regulated solely by the CFTC.

Despite Congress' assertion that it had provided the CFTC with exclusive jurisdiction, SEC Chairman Ray Garrett, Jr., termed the CFTC Act "ambiguous" on the question of pre-emption and proposed amending the Securities and Exchange Act so as to repeal the CFTC's exclusive juridiction.[78] SEC Chairman Garrett's successor, Roderick M. Hills, also questioned the CFTC's exclusive jurisdiction in a letter to CFTC Chairman William Bagley: "Both the CFTC and this Commission should be concerned, not with the bare question of *jurisdiction*, but with a number of important questions relating to the integrity and viability of our capital markets, and the effect furtures trading will have on the securities markets and on public investors therein."[79] Chairman Hills also intimated that he would seek legislative relief to clear up the controversy.[80]

In an effort to clarify the purpose of granting the CFTC exclusive jurisdiction, Howard Schneider, General Counsel for the CFTC, stated that because it was Congress' feeling that the bureaucratic red tape inherent in registering with a federal agency and fifty separate state agencies was unnecessary, the CFTC Act was intended to discourage state registration or licensure of persons in the commodities field.[81] However, Schneider's suggestion lacks persuasion because the avoidance of red tape has never provided grounds for pre-emption. Moreover, Schneider's inference that broker registration would be discouraged indicates that such registration does not fall within the CFTC's exclusive jurisdiction. Finally, broker registration would be desirable if the "fundamental purpose of the Commodity Exchange Act is to insure fair practice and honest dealing on the commodity exchanges and to provide a measure of control over those forms of speculative activity which too often demoralize the markets to the injury of producers and consumers."[82]

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[77]120 CONG. REC. 30458 (1974). *See* text accompanying note 72 *supra*.

[78]Letter from Ray Garrett, Jr., to Harley O. Staggers (Feb. 14, 1975).

[79][1975] SEC. REG. & L. REP. (BNA) No. 329 at F-1.

[80]*Id.* at F-2.

[81]Schneider, *The CFTC: Initial Actions and Future Priorities*, 27 AD. L. REV. 369 (1975).

[82]S. REP. NO. 93-1131, 93d Cong., 2d Sess. 23, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 5826.

Shortly after the CFTC Act took effect, the CFTC and SEC were involved in litigation on the question of jurisdiction. In July 1975, the CFTC filed a brief as *amicus curiae* in *SEC v. American Commodity Exchange, Inc.*,[83] in which the SEC sought to enjoin alleged violations of the federal securities laws by a dealer in commodity options. The SEC contended that commodities were securities, and that the defendant had violated the registration requirements, anti-fraud provisions, and broker-dealer registration requirements of the federal securities laws. Although the trial court failed to resolve the issue because the alleged violation occurred prior to the effective date of the CFTC Act,[84] the Tenth Circuit Court of Appeals held that to deprive the SEC of jurisdiction in cases where securities violations had occurred in the period between passage of the CFTC Act and its effective date would create a "no-man's land" for jurisdictional purposes.[85] The court relied on House and Senate floor debates as evidence of Congress' intent not to do away with interim jurisdiction and to allow the SEC to complete its investigations of pending cases.[88]

The first reported test involving the CFTC's pre-emptive power arose in a Texas state court. In *Texas v. Monex International, Ltd.*,[87] the Texas state securities commission sought to enjoin Monex from selling its margin account investment plan based on the reasoning that the accounts were "leverage" contracts and were within the definition of securities. Defendant had failed to register these "securities" as required by the Texas Securities Act. The trial court denied the injunction, concluding that Monex was not selling securities within the meaning of the Texas Securities Act. Although the appellate court affirmed, its decision relied on pre-emption rather than on the statutory definition of securities, stating: "The State contends Pacific's 'margin account' investment plan constitutes an 'investment contract' and is thus a security. . . . We do not reach this point. . . . We think it is clear the newly established Commodity Futures Trading Commission now has exclusive jurisdiction to regulate Pacific's margin account sales."[88] In addition, the court did not discuss whether the CFTC had exclusive jurisdiction over the commodity as well as the brokers, or only over the commodity transaction.

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[83]546 F.2d 1361 (10th Cir. 1976).

[84][1975-1977 Transfer Binder] COMM. FUT. L. REP. (CCH) ¶ 20,063 (W.D. Okla. 1975), *aff'd*, 546 F.2d 1361 (10th Cir. 1976).

[85]546 F.2d at 1367.

[88]*Id.* at 1368.

[87]527 S.W.2d 804 (Tex. Ct. App. 1975).

[88]*Id.* at 806.

One curious aspect of the *Monex* case is that it was dismissed even though it was brought prior to the CFTC Act's effective date. This contradicts the CFTC's statement in *American Commodity Exchange*, wherein the agency avowed that it would not exercise jurisdiction over matters occurring before April 21, 1975.[89] However, the *Monex* court allowed the litigation to continue instead of granting dismissal, because the Texas commission sought to enjoin future conduct that would be governed by the CFTC's jurisdiction.[90]

Two other cases, *Clayton Brokerage Co. v. Mouer*[91] and *SEC v. Univest, Inc.*,[92] also failed to clarify the jurisdictional dispute over commodity dealers because that issue was never litigated.[93] Finally, in *New York v. Monex International, Ltd.*,[94] a New York court conceded that some transactions in the commodities field might be considered securities transactions and that overlap might create a conflict in jurisdiction between the SEC and the CFTC. However, because the parties failed to raise the jurisdictional issue, the court decided the case without addressing the jurisdictional issue, relying instead on the intent of the CFTC Act not to abate proceedings pending at the time the Act became effective.[95]

Because the few cases that have been litigated since formation of the CFTC have not conclusively settled the issue of whether the CFTC Act pre-empts a co-extensive state statute, various state agencies have called upon the CFTC for its interpretation of the conflict. In a letter to the Indiana Securities Commission, the CFTC expressed the opinion that a commodity options trading advisor who offers and sells commodity options to the public is not required to register as a broker-dealer under state securities law, because the CFTC Act pre-empts state law insofar as it seeks to regulate commodity options transactions.[96] The CFTC cited *Clayton Brokerage*,

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[89][1975-1977 Transfer Binder] COMM. FUT. L. REP. (CCH) ¶ 20,063 (W.D. Okla. 1975), *aff'd*, 546 F.2d 1361 (10th Cir. 1976).

[90]527 S.W.2d at 807.

[91]520 S.W.2d 802 (Tex. 1975).

[92]405 F. Supp. 1057 (N.D. Ill. 1975).

[93]*Clayton Brokerage* was dismissed because the question as to the necessity of state registration of London commodity options became moot with the passage of the CFTC Act. *SEC v. Univest* was dismissed on grounds the SEC lacked standing to sue because the proceedings were not pending prior to passage of the CFTC Act.

[94]86 Misc. 2d 320, 380 N.Y.S.2d 504 (N.Y. Sup. Ct. 1976).

[95]*Id.* at 324, 380 N.Y.S.2d at 508-09. Monex International engaged in margin sales of gold and silver coins and bullion. These transactions could also be considered sales of securities because commodities are not traded on margins in the same sense as securities.

[96]CFTC Interpretive Letter No. 76-19, [1975-1977 Transfer Binder] COMM. FUT. L. REP. (CCH) ¶ 20,213 (1976). A similar letter was sent to the California Commission:

> It is our view . . . that the California Commodity Law and the regulations adopted thereunder may not constitutionally be enforced insofar as they seek

Univest, and *Texas v. Monex International, Ltd.* to substantiate its argument, even though these cases did not resolve the jurisdictional issue. Furthermore, the CFTC failed to solve the definitional problem of whether "transaction" includes broker-dealers; the CFTC merely assumed that by pre-empting transactions entered into by brokers it also pre-empted the requirement that the brokers themselves be registered.[97] This interpretation relies on circuitous reasoning and leaves unsettled the state registration requirement issue.

Additionally, the CFTC noted that if the interpretation of the CFTC Act in the *Clayton Brokerage*, *Univest*, and *Texas v. Monex International, Ltd.*, cases is correct, the federal regulatory scheme prevails regardless of whether it is as strict as that of certain states.[98] However, this statement may be modified by *Davis v. Aetna Casualty & Surety Co.*,[99] a recent decision based upon the National Flood Insurance Act.[100] In *Davis*, the court determined that even though the federal act did not impose a penalty on insurers who arbitrarily refused to pay an insured's claims, states were not precluded from applying their own statutory penalties. In finding that the purposes of the National Flood Insurance Act[101] did not coincide with the purposes of the state statute,[102] the court reasoned that the two statutes could be read in harmony, and that the federal act was not intended to pre-empt state law in areas in which Congress had not acted. Reiterating Justice Brennan's opinion in *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware*,[103] the court reasoned that pre-emption in some contexts has been determined by whether

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> to regulate the activities of commodity trading advisors or other persons subject to the Commission's exclusive jurisdiction under the pervasive regulatory scheme of the Commodity Exchange Act.

CFTC Interpretive Letter No. 76-20, [1975-1977 Transfer Binder] COMM. FUT. L. REP. (CCH) ¶ 20,214 (1976).

[97]CFTC Interpretive Letter No. 76-19, *supra* note 96.

[98]*Id.*

[99]329 So. 2d 868 (La. Ct. App. 1975).

[100]42 U.S.C. §§ 4001-4128 (1976).

[101]The purposes of the 1973 amendments to the Act were (1) to provide for flood insurance on a nationwide scale at a reasonable cost; (2) to provide for identification of flood-prone areas; (3) to require states or local communities, as a condition of future federal financial assistance, to participate in the flood insurance program and to adopt adequate flood plain ordinances; and (4) to require the purchase of flood insurance by property owners who are being assisted by federal programs or by federally supervised, regulated, or insured agencies or institutions in the acquisition or improvement of land or facilities located or to be located in identified areas having special flood hazards. 42 U.S.C. § 4002 (1976).

[102]The state statute was designed to protect the insured and to facilitate the prompt settlement of his claims. LA. REV. STAT. ANN. § 22:658 (West 1959).

[103]414 U.S. 117 (1973).

the contested state statute frustrates any part of the purpose of the federal legislation. Hence, the Louisiana statute was not pre-empted because it did not thwart the purposes of the National Flood Insurance Act.

Likewise, in *Edina State Bank v. Mr. Steak, Inc.*,[104] the state statute at issue required an issuer of stock to display any transfer restrictions conspicuously on the face of the stock certificate. Any restriction not so noted would be ineffective against one without actual knowledge of it.[105] The Securities Act of 1933[106] did not impose such an obligation, but the court reversed the trial court holding that the federal act had pre-empted the state statute, stating:

> We cannot agree that the absence of a requirement for a notation of the restriction in the federal statute overrides [the state statute] under the doctrine of preemption. . . . [W]e feel that this important provision of the [state statute] may be read in harmony with the federal statute. Both regulations can be enforced without impairing federal superintendence of the field and thus the state statute need not give way.[107]

Analogously, the purpose of a state law requiring registration of commodity futures broker-dealers would likely be to protect the public from persons who are unqualified to deal in commodities but nonetheless enter into such transactions. Therefore, according to the reasoning in *Mr. Steak*, even though the CFTC Act purports to vest the CFTC with exclusive jurisdiction over all commodities transactions, this jurisdiction should not extend to areas not covered by the Act or which are compatible with the Act's purpose.

In addition to the area of registration, the issue of whether the CFTC Act has pre-empted state anti-fraud provisions is still unresolved. Although the CFTC is charged with the primary responsibility of protecting the public against commodity frauds through enforcement of the Commodity Exchange Act,[108] it is questionable whether the CFTC has the tools with which to detect and prosecute fraudulent conduct in connection with futures trading, the sale of

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[104]487 F.2d 640 (10th Cir.), *cert. denied*, 419 U.S. 883 (1974).

[105]COLO. REV. STAT. § 4-8-204 (1973) (originally enacted as COLO. REV. STAT. § 155-8-204 (1963)).

[106]15 U.S.C. §§ 77a-77aaa (1976).

[107]487 F.2d at 644. The court relied on Florida Lime & Avocado Growers v. Paul, 373 U.S. 132, 142 (1963), and New York State Dep't of Social Services v. Dublino, 413 U.S. 405, 417 (1973), to substantiate its opinion.

[108]Section 6c of the Commodity Exchange Act, 7 U.S.C. § 13a-1 (1976), empowers the CFTC to seek injunctive relief in the federal courts to ensure compliance with the Act.

commodity options, or the offering of "leverage" contracts in gold and silver bullion or bulk coins. The most frequently cited policy rationale in criticism of the CFTC's exclusive jurisdiction is that other agencies may be better equipped to prevent fraudulent activities,[109] and at least one court has held that the anti-fraud provisions of the federal securities laws are broader in scope than those provided by the CFTC Act. In *McCurnin v. Kohlmeyer & Co.*,[110] the court refused to read section 4b of the Commodity Exchange Act[111] as broadly as other courts' rulings under SEC rule 10b[112] because section 4b(B) is directed only toward "willful" misconduct in connection with the use of fraudulent devices, while rule 10b is directed at misconduct regardless of its willfulness.[113]

Notwithstanding the narrow *McCurnin* decision, the CFTC has interpreted the anti-fraud provisions of the Commodity Exchange Act broadly.[114] However, such an interpretation is unwarranted; section 4b applies only to those persons acting as agents or brokers in

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[109]For a collection of jurisdictional correspondence of the CFTC and the SEC, *see* [1975-1977 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 80,336.

[110]347 F. Supp. 573 (E.D. La. 1972).

[111]Section 6b of the Commodity Exchange Act, 7 U.S.C. § 6b (1976), provides in part:

> It shall be unlawful (1) for any member of a contract market, or for any correspondent, agent, or employee of any member, in or in connection with any order to make, or the making of, any contract of sale of any commodity in interstate commerce, made, or to be made, on or subject to the rules of any contract market, for or on behalf of any other person . . .
>
> (A) to cheat or defraud or attempt to cheat or defraud such other person;
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> (B) willfully to make or cause to be made to such other person any false report or statement thereof, or willfully to enter or cause to be entered for such person any false record thereof;
>
> (C) willfully to deceive or attempt to deceive such other person by any means whatsoever in regard to any such order or contract . . . or in regard to any act of agency performed with respect to such order or contract for such person . . . .

Section 78j of the Securities and Exchange Act of 1934, 15 U.S.C. § 78j (1976), provides:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—
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> . . . .
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> (b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

[112]17 C.F.R. §§ 240.10b-1 to -17 (1977).

[113]347 F. Supp. at 575-76.

[114]40 Fed. Reg. 26,505 (1975).

commodity transactions, and not to the principals in the transactions.[115] It appears, then, that a fraud committed by a principal to the transaction (a buyer or seller) or by a third party not acting as a principal's agent cannot be the basis of a private suit or disciplinary action under section 4b of the Commodity Exchange Act.[116] In contrast, it is well established that under section 10(b) of the Securities Exchange Act of 1934,[117] a defrauded investor can proceed against a violator other than the broker.[118] Hence, because state securities laws reflect the SEC provisions in the area of commodities regulation, they should not be pre-empted in order to fill the gap between state and federal anti-fraud statutes.

Although the ability of the states to implement their own anti-fraud laws indicates that the CFTC Act does not totally pre-empt state law, the CFTC has suggested that the Act does not apply to registration of broker-dealers:

> [T]he Commission has instructed its staff to draft regulations that among other things would:
> (1) make it unlawful for any person to offer or sell to the public commodity options, or to be associated with any such person, unless registered as a futures commission merchant or associated person, respectively, and thereby subject to plenary regulation under the Act.[119]

The CFTC does not define "associated person," but if brokers are covered by the term, then the gap left by the CFTC Act would be bridged.

Finally, reflecting the views of state securities commissioners at a panel discussion of the CFTC, a panel member expressed the fear that commodities investors would lose faith in the investment markets, the industry, and Congress if they were not given substantial protection under the law. It was suggested that pre-emption would be unreasonable where states have strong, active regulation because of the maximum protection these state laws afford the

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[115]7 U.S.C. § 6 (1976).

[116]All cases under section 4b, 7 U.S.C. § 6b (1976), for example, have been brought by investors against their brokers. *See, e.g.*, Booth v. Peavy Co. Commodity Servs., 430 F.2d 132 (8th Cir. 1970); Gould v. Barnes Brokerage Co., 345 F. Supp. 294 (N.D. Tex. 1972); McCurnin v. Kohlmeyer & Co., 347 F. Supp. 573 (E.D. La. 1972).

When effort has been made to invoke section 4b in the absence of a broker-investor relationship, the suit has been dismissed. *See, e.g.*, Rosee v. Board of Trade, 311 F.2d 524 (7th Cir. 1963).

[117]15 U.S.C. § 78j (1976).

[118]*See, e.g.*, Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975).

[119]CFTC Interpretive Letter No. 76-19, [1975-1977 Transfer Binder] COMM. FUT. L. REP. (CCH) ¶ 20,213.

public, and that pre-emption would be impractical where sources of information and manpower are available on a local basis but lacking at the federal level.[120]

III. CONCLUSION

Two questions arise when considering whether the Commodity Futures Trading Commission Act has totally pre-empted state law in the area of commodities. The first inquiry is whether pre-emption in general is a favored policy, and the second is whether the CFTC in fact has exclusive jurisdiction over the field of commodities.

A survey of cases involving pre-emption reveals a trend toward allowing state law to stand when Congress has remained silent or has not explicitly covered the subject matter it purports to pre-empt. A finding of pre-emption, however, hinges on the view that the courts take toward federalism. If the courts view the federal government's purposes as requiring protection in a given area, then pre-emption takes the form of a presumption of federal exclusivity, and state interests will be held subordinate to those federal interests. On the other hand, if the aims of the federal and state governments complement each other, congressional action on a certain matter will not carry a presumption of pre-empting state law.

For a period of time, the federal presumption predominated, and pre-emption was found even in the absence of clear congressional intent that state law in the same field was barred. As a result, state law that was either incompatible with federal legislation or that acted in an area left untouched by Congress was doomed. The Supreme Court has recently realized, however, that such a result is unfortunate because states and their citizens may be left without the protection that their own laws sought to provide. The Court has begun to invoke a standard of specific intent when Congress purports to exclusively control a field, and, absent a showing of this intent, state interests will be favored.

Even though Congress may have intended to give the CFTC exclusive jurisdiction, this intent was not clearly expressed in the CFTC Act. Although it is conceded that the CFTC Act pre-empts most areas of commodities regulation, some areas have been left untouched. Moreover, because the purpose of commodities regulation is to protect the investing public, it would be undesirable to presume total pre-emption and leave the investor unprotected. The better result would be to let state law stand when it is not in con-

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[120]Wunder, *Commodities Regulation: State and Federal Jurisdiction*, 27 AD. L. REV. 377 (1975).

flict with federal legislation or when it applies to an area left untouched by Congress. If Congress truly intended total pre-emption, it can later clarify its position by acting on that matter.

ANITA SAKOWITZ

Recent Development

Torts—JUDICIAL IMMUNITY—Judge's erroneous grant of a sterilization petition held not in clear absence of jurisdiction and therefore entitled to the defense of judicial immunity. *Stump v. Sparkman*, 46 U.S.L.W. 4253 (U.S. Mar. 28, 1978).

In *Stump v. Sparkman*,[1] the United States Supreme Court rendered its first major decision on the scope of judicial immunity in more than a century.[2]

In 1971, a mother presented to an Indiana circuit court judge a petition seeking to perform a tubal ligation on her fifteen-year-old daughter. The judge approved the petition in an ex parte proceeding without notice to the daughter, without the appointment of a guardian ad litem, and without a hearing.[3] Five years after the operation, the daughter brought a damage suit against the judge in federal district court under 42 U.S.C. § 1983,[4] for alleged deprivation of her constitutional rights. The district court dismissed the action on the grounds that the judge was immune from liability under the doctrine of judicial immunity.[5] The Seventh Circuit Court of Appeals reversed the judgment of the district court, holding that the judge

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[1]46 U.S.L.W. 4253 (U.S. Mar. 28, 1978).

[2]Bradley v. Fisher, 80 U.S. (13 Wall.) 335 (1872).

[3]46 U.S.L.W. at 4254, 4256. The minor had been told that the operation was for the removal of her appendix. *Id.* at 4254.

[4]Civil Rights Act of 1871, 42 U.S.C. § 1983 (1970), provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Section 1983 creates, in effect, a federal tort action against any state officer who, under color of state law, deprives a person of his constitutional or federal rights. The test for color of state law in a civil suit against a judge is whether the judge is representing the state and wearing its badge of authority. Monroe v. Pape, 363 U.S. 167, 172 (1961); Lucarell v. McNair, 453 F.2d 836, 838 (6th Cir. 1972). Under § 1983, the scope of a judge's immunity is a question of federal, not state, law. Garfield v. Palmieri, 279 F.2d 526 (2d Cir. 1962); Nelson v. Knox, 256 F.2d 312 (6th Cir. 1958). In Pierson v. Ray, 386 U.S. 547, 554 (1967), the Supreme Court determined that § 1983 is subject to the doctrine of judicial immunity. Thus, the standard enunciated in *Stump* determines the liability of a state court judge who has been sued under § 1983. In addition, most states have adopted the doctrine of judicial immunity as it was first established by the Supreme Court in Bradley v. Fisher, 80 U.S. (13 Wall.) 335 (1872). The *Stump* Court opinion is essentially a modern application of *Bradley* principles.

[5]Sparkman v. McFarlin, Civil No. F 75-129 (N.D. Ind. May 13, 1976), *rev'd*, 552 F.2d 172 (7th Cir. 1977), *rev'd sub. nom.* Stump v. Sparkman, 46 U.S.L.W. 4253 (U.S. Mar. 28, 1978).

had acted outside of his jurisdiction and had failed to comply with principles of due process.[6]

The Supreme Court held that the circuit court judge had performed a judicial act that was not in clear absence of all jurisdiction,[7] and he was therefore entitled to judicial immunity.[8] The Court's opinion focused on two critical aspects of the doctrine of judicial immunity: The concept of jurisdiction and the judicial act requirement. The Court's interpretation of these terms determined the extent of a judge's immunity from civil liability.

I. JURISDICTION ANALYSIS

The Supreme Court set forth its last major interpretation of the doctrine of judicial immunity in 1872 in *Bradley v. Fisher.*[9]

> [J]udges of courts of superior or general jurisdiction are not liable to civil actions for their judicial acts, even when such acts are *in excess of their jurisdiction*, and are alleged to have been done maliciously or corruptly. A distinction must be here observed *between excess of jurisdiction* and the *clear absence of all jurisdiction over the subject matter.*[10]

Bradley has since been universally accepted as establishing the governing principles of the doctrine. Before concluding that Judge Stump was immune from civil liability, the Supreme Court scrutinized his jurisdiction over the petition for sterilization. This inquiry was to determine whether the judge had acted in clear absence of all jurisdiction.[11]

In analyzing Judge Stump's jurisdiction, the Court first examined the statutory authority vested in an Indiana circuit court judge. Under Indiana law, such a judge has "original exclusive jurisdiction

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[6]Sparkman v. McFarlin, 552 F.2d 172, 176 (7th Cir. 1977), *rev'd sub nom.* Stump v. Sparkman, 46 U.S.L.W. 4253 (U.S. Mar. 28, 1978).

[7]46 U.S.L.W. at 4255.

[8]*Id.* at 4257.

[9]80 U.S. (13 Wall.) 335 (1872).

[10]*Id.* at 351 (emphasis added). To illustrate the distinction between "excess" and "clear absence" of all jurisdiction, the *Bradley* Court contrasted the following hypotheticals. The first involved a probate court judge whose jurisdiction was limited to wills and estates. If such a judge were to assume jurisdiction over criminal matters and proceeded to try a defendant for a public offense, his acts would be in clear absence of all jurisdiction and would subject him to civil liability. The second example involved a judge with general jurisdiction over criminal offenses. If that judge were to convict and sentence a defendant for a nonexistent crime, his acts would be merely in excess of his jurisdiction. *Id.* at 352.

[11]Stump v. Sparkman, 46 U.S.L.W. 4253, 4255 (U.S. Mar. 28, 1978); Imbler v. Pachtman, 424 U.S. 409, 418 (1976); Pierson v. Ray, 386 U.S. 547, 554 (1967).

in all cases at law and in equity whatsoever . . . and in all other proceedings where exclusive jurisdiction thereof is not conferred by law upon some other court, board or officer."[12] The Court then noted that a now-repealed Indiana statute expressly authorized sterilization, but only upon institutionalized persons.[13] The Court rejected the contention that these statutes implied that a circuit court was without jurisdiction to consider a petition for sterilization in other circumstances.[14] The Court stated that the statutes do not warrant the inference that a court of general jurisdiction cannot entertain such a petition when brought by the parents of a minor.[15] In concluding its analysis, the Court held that, since there was no case law or statute expressly proscribing the court's power to consider a petition for sterilization, the defendant did not act in clear absence of all jurisdiction.[16]

A more precise understanding of jurisdiction, as used in the context of judicial immunity, emerges from the Court's application of the *Bradley* principles. First, the Court unequivocally held that whether a judge is within the ambit of immunity depends on his jurisdiction over the subject matter.[17] The term "subject matter jurisdiction" refers only to the authority of a court to decide a particular type of case—*i.e.*, criminal, adoption, probate of an estate, or divorce.[18] Thus, a judge presiding over an action within the general

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[12]IND. CODE § 33-4-4-3 (1976). This section also provides:

> Said court shall have original exclusive jurisdiction in all cases at law and in equity whatsoever, and in criminal cases and actions for divorce, except where exclusive or concurrent jurisdiction is, or may be conferred by law upon justices of the peace. It shall also have exclusive jurisdiction of the settlement of decedents' estates and of guardianships: Provided, however, That in counties in which criminal or superior courts exist of may be organized nothing in this section shall be construed to deprive such courts of the jurisdiction conferred upon them by laws, and it shall have such appellate jurisdiction as may be conferred by law, and it shall have jurisdiction of all other causes, matters and proceedings where exclusive jurisdiction thereof is not conferred by law upon some other court, board or officer.

[13]Ch. 227, § 1, 1951 Ind. Acts 649; ch. 244, §§ 1-3, 1937 Ind. Acts 1164; ch. 312, §§ 1-6, 1935 Ind. Acts 1502; ch. 50, §§ 2-6, 1931 Ind. Acts 116; ch. 241, §§ 1-6, 1927 Ind. Acts 713 (repealed 1974) (formerly codified at IND. CODE ANN. §§ 16-13-13-1 to -16-1 (Burns 1973)).

[14]46 U.S.L.W. at 4255.

[15]*Id.*

[16]*Id.* at 4256. The dissent did not challenge the majority's conclusion that the judge did not act in clear absence of all jurisdiction. *Id.* at 4258 n.5 (Stewart, J., dissenting).

[17]46 U.S.L.W. at 4255.

[18]Murrell v. Stock Growers' Nat'l Bank of Cheyenne, 74 F.2d 827 (10th Cir. 1934); Rensing v. Turner Aviation Corp., 166 F. Supp. 790 (N.D. Ill. 1958); Olcott v. Pendleton, 128 Conn. 292, 22 A.2d 633 (1941); Williams v. Kaylor, 218 Ga. 576, 129 S.E.2d 791 (1963); J.R. Watkins Co. v. Kramer, 250 Iowa 947, 97 N.W.2d 303 (1959); Brumm v. Pittsburgh Nat'l Bank, 213 Pa. Super. Ct. 443, 249 A.2d 916 (1968).

class of cases that he is empowered to entertain will never act in clear absence of all jurisdiction. Any error will be merely in excess of his jurisdiction. The inquiry is limited to the power to render a decision and does not consider the particular decision made.[19]

This interpretation of jurisdiction overrules a line of cases which held that the jurisdiction requirement necessitated an inquiry into the decision that had been rendered.[20] In these cases, a judge acted in clear absence of all jurisdiction if there were no set of circumstances or conditions authorizing his action, even though he had jurisdiction over the subject matter.[21] *Wade v. Bethesda Hospital*[22] illustrated this analysis. There an action had been brought against a probate court judge for ordering the performance of a tubal ligation on a retarded person. The district court held that the judge had acted in clear absence of all jurisdiction.[23] In reaching this result, the court did not inquire into the judge's power to decide the case but instead examined Ohio law to determine if there were any conditions that would permit the judge to *issue* the sterilization order. Under the jurisdictional test required by *Stump*, the judge would have been immune.[24]

Prior to *Stump*, some cases held, at least with respect to sterilization, that there must be *specific* statutory or common law authority vesting the court with jurisdiction over the subject matter.[25] The most recent case so holding was *Briley v. California*.[26] This section 1983 action was brought against a judge and a prosecutor for allegedly coercing the plaintiff to submit to castration as part of a

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[19]The *Stump* Court was concerned only as to whether case or statutory law had circumscribed the judge's power to approve a petition for tubal ligation. 46 U.S.L.W. at 4256.

[20]Briley v. California, 564 F.2d 849 (9th Cir. 1977); Harley v. Oliver, 539 F.2d 1143 (8th Cir. 1976); Martin v. Merola, 532 F.2d 191 (2d Cir. 1976); Duba v. McIntyre, 501 F.2d 590 (8th Cir. 1974), *cert. denied*, 424 U.S. 975 (1976); Hevelone v. Thomas, 423 F. Supp. 7 (D. Neb. 1976); Wade v. Bethesda Hosp., 337 F. Supp. 671 (S.D. Ohio 1971).

[21]*See* note 20 *supra*.

[22]337 F. Supp. 671 (S.D. Ohio 1971).

[23]*Id.* at 673-74.

[24]Although the defendant in *Wade* was not a judge of general jurisdiction, his jurisdiction under Ohio law was broad: "The probate court shall have plenary power at law and in equity fully to dispose of any matter properly before the court, unless the power is expressly otherwise limited or denied by statute." OHIO REV. CODE ANN. § 2101.24 (Page 1976). As in *Stump*, this grant of jurisdiction was sufficient to empower the judge to act on the affidavit by the welfare board. The fact that he acted erroneously in issuing the order was not relevant to the question of immunity. 337 F. Supp. at 673.

[25]Briley v. California, 564 F.2d 849 (9th Cir. 1977); Sparkman v. McFarlin, 552 F.2d 172 (7th Cir. 1977), *rev'd sub nom.*, Stump v. Sparkman, 46 U.S.L.W. 4253 (U.S. Mar. 28, 1978); Wade v. Bethesda Hosp., 337 F. Supp. 671 (S.D. Ohio 1971).

[26]564 F.2d 849 (9th Cir. 1977).

plea bargain agreement. The court remanded the case with the instruction that the availability of judicial immunity would depend upon the existence of specific statutory authority empowering the judge to order the castration.[27]

That instruction is now an erroneous statement of the law. The *Stump* Court held that "the scope of a judge's jurisdiction must be construed broadly."[28] The absence of specific authority in Indiana to act upon the petition for sterilization was not considered significant, according to the Court; the critical factor was that neither case law nor statute expressly prohibited the judge from entertaining the petition.[29] Therefore, a judge of a court of general jurisdiction will be deemed to have jurisdiction over the subject matter of any case before him, for purposes of judicial immunity, if there is not a specific statutory or case law prohibition.[30]

The Supreme Court's discussion of *A.L. v. G.R.H.*[31] demonstrated that a judge who failed to observe a statutory or case law limitation on his judicial power would not be deprived of the defense of judicial immunity unless the limitation directly circumscribed his subject matter jurisdiction. That Indiana decision held that parents have no common law right to seek the sterilization of their children.[32] The Supreme Court emphasized that *A.L. v. G.R.H.* did not question a judge's power to consider and act upon a petition for sterilization and concluded that the decision imposed a restriction only on the manner in which a judge should exercise his jurisdiction.[33] Thus, Judge Stump's *approval* of the sterilization in contravention of Indiana law was merely in excess of his jurisdiction.

The principle that an act in excess of jurisdiction is covered by a judicial immunity defense dates back to *Bradley* and is acknowledged

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[27]*Id.* at 857-58.

[28]46 U.S.L.W. at 4255.

[29]*Id.* at 4255-56. The Court refused to infer a lack of jurisdiction from the express statutory limitation of jurisdiction to institutionalized persons. *See* text accompanying note 16 *supra.*

[30]The extent to which this conclusion applies to courts of inferior jurisdiction is not clear. One can argue, however, that where the subject matter jurisdiction of the court is precisely itemized by statute, the *Briley* analysis should be employed. *See* notes 26-28 *supra* and accompanying text.

[31]325 N.E.2d 501 (Ind. Ct. App. 1975), *discussed in* Stump v. Sparkman, 46 U.S.L.W. at 4256.

[32]325 N.E.2d at 502.

[33]The Court explained:

> A circuit court judge would err as a matter of law if he were to approve a parent's petition seeking the sterilization of a child . . . . Indeed, the clear implication of the opinion is that . . . the circuit judge should deny [the petition] on its merits rather than dismissing it for lack of jurisdiction.

Id.

in the recent cases.[34] Unfortunately, the distinction between a limitation on the power to decide a case and a limitation that dictates the proper exercise of that power is not always easily or consistently made.[35] The difficulty can be seen in the cases that dealt with the power of a judge to order sterilization. Missouri,[36] Texas,[37] and Kentucky[38] have all held that the courts of their states do not have subject matter jurisdiction over cases involving sterilization.[39] Under the *Stump* analysis, these cases impose a restriction that forecloses judicial consideration of sterilization. If a judge in one of these states were to authorize a sterilization, he would act in clear absence of all jurisdiction and would be liable in a civil action. In Indiana, on the other hand, a judge can issue the same order and, possessing jurisdiction over the subject matter, be entitled to the defense of judicial immunity.

Some courts have indicated that where a judge violates a specific statute or commits an illegal act, judicial immunity will not be a defense.[40] In *Luttrell v. Douglas*,[41] the actions of a criminal court judge were held to be beyond the scope of immunity when he conditioned the appointment of a public defender upon payment of attorney fees.[42] Although an Illinois statute authorized the judge of a court of criminal jurisdiction to appoint a public defender for an indigent defendant, the same statute expressly prohibited the payment of fees to a public defender.[43] Thus, the judge in *Luttrell* had jurisdiction over both criminal offenses and the appointment of public defenders. His error, therefore, was in the exercise of that jurisdiction.

The Supreme Court did not directly consider this point in *Stump*. From what the Court did say, however, *Luttrell* is, at least, a questionable precedent. Several times in the opinion, the Court noted that the restriction on a court's power must relate to the *authority* to decide the controversy and not merely to *how* it should

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[34]Harley v. Oliver, 539 F.2d 1143 (8th Cir. 1976); Williams v. Williams, 532 F.2d 120 (8th Cir. 1976); Potter v. LaMunyon, 389 F.2d 874 (10th Cir. 1968); Ryan v. Scoggin, 245 F.2d 54 (10th Cir. 1957); McGlasker v. Calton, 397 F. Supp. 525 (M.D. Ala. 1975); Luttrell v. Douglas, 220 F. Supp. 278 (N.D. Ill. 1963).

[35]20 AM. JUR. 2d *Courts* § 90 (1965).

[36]*In re* M.K.R., 515 S.W.2d 467 (Mo. 1974).

[37]Frazier v. Levi, 440 S.W.2d 393 (Tex. Ct. App. 1969).

[38]Holmes v. Powers, 439 S.W.2d 579 (Ky. 1969).

[39]These cases were direct appeals and did not involve the issue of judicial immunity.

[40]*See, e.g.*, Jacobson v. Schaefer, 441 F.2d 127 (7th Cir. 1971); Barksdale v. Ryan, 398 F. Supp. 700 (N.D. Ill. 1974); Luttrell v. Douglas, 220 F. Supp. 278 (N.D. Ill. 1963).

[41]220 F. Supp. 278 (N.D. Ill. 1963).

[42]*Id.* at 279. The suit was dismissed, despite the absence of immunity, for failure to allege deprivation of a constitutionally protected right.

[43]ILL. REV. STAT. ch. 38, § 113-3; *id.* ch. 34, §§ 5604-5605 (1973).

be decided.[44] That the statutory restriction is unambiguous seems to be immaterial. When a judge commits an illegal act or is neglectful of his official duties, the proper course is to file criminal charges.[45]

The Seventh Circuit Court of Appeals, in what appeared to be an alternative holding, stated: "Even if defendant Stump had not been foreclosed under the Indiana statutory scheme, we would still find his action to be an illegitimate exercise of his common law power because of his failure to comply with elementary principles of procedural due process."[46] The judge's procedural errors included the failure to appoint a guardian ad litem, the failure to give notice of the true nature of the proceeding to the daughter, and the failure to afford an opportunity to contest the petition.[47] The Supreme Court, noting that the Seventh Circuit had mis-conceived the doctrine of judicial immunity, held that "the commission of grave procedural errors" in the exercise of a conferred power would destroy a judge's immunity from liability.[48] This statement is consistent with the principle enunciated in *Bradley*.[49] Other courts that have considered the issue have also consistently followed *Bradley*.[50]

Perkins v. United States Fidelity & Guaranty Co.[51] is representative. The plaintiff in *Perkins* alleged that the judge had ordered his commitment to a mental hospital without providing him with notice and the opportunity to be heard. The court, after finding the judge had jurisdiction over the commitment proceeding, stated that non-observance of procedural safeguards did not destroy a court's jurisdiction over the case and, thus, did not affect the availability of judicial immunity.[52] One must conclude that procedural matters, such

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[44]46 U.S.L.W. at 4255-56.

[45]The immunity doctrine holds, however, that misperformance of a judicial act by a judge acting honestly and in good faith does not constitute criminal conduct. Braatelien v. United States, 147 F.2d 888 (8th Cir. 1945); People v. Ferguson, 20 Ill. 2d 295, 170 N.E.2d 171 (1960); Commonwealth v. Tartar, 239 S.W.2d 265 (Ky. 1951); Robbins v. Commonwealth, 232 Ky. 115, 22 S.W.2d 440 (1929).

[46]Sparkman v. McFarlin, 552 F.2d 172, 176 (7th Cir. 1977), *rev'd sub nom.* Stump v. Sparkman, 46 U.S.L.W. 4253 (U.S. Mar. 28, 1978).

[47]*Id.*

[48]46 U.S.L.W. at 4256.

[49]The *Bradley* Court, referring to the procedural errors committed by the defendant judge, stated: "But this erroneous manner in which its jurisdiction was exercised, however it may have affected the validity of the act, did not . . . render the defendant liable to answer in damages . . . as though the court had proceeded without having any jurisdiction whatever . . . ." 80 U.S. (13 Wall.) at 357.

[50]Duba v. McIntyre, 501 F.2d 590 (8th Cir. 1974), *cert. denied*, 424 U.S. 975 (1976); Perkins v. United States Fidelity & Guar. Co., 433 F.2d 1303 (5th Cir. 1970); Sullivan v. Kelleher, 405 F.2d 487 (1st Cir. 1968); Potter v. LaMunyon, 389 F.2d 874 (10th Cir. 1968); Ryan v. Scoggin, 245 F.2d 54 (10th Cir. 1957).

[51]433 F.2d 1303 (5th Cir. 1970).

[52]*Id.* at 1304.

as the right to notice and a hearing, involve only the exercise of a conferred power. Error in the exercise of this power falls squarely within the immunity doctrine.

In *Stump*, the Supreme Court did not dwell on the policy reasons for providing immunity for a judge who acts in excess of his jurisdiction. Relying on a quotation from *Bradley*, the Court stated that it is important to the administration of justice that a judge be free to act without fear of personal consequences.[53] A more satisfactory explanation can be found in *Pierson v. Ray*:[54]

> The judicial function involves an informed exercise of judgment. It is often necessary to choose between differing versions of fact, to reconcile opposing interests, and to decide closely contested issues. Decisions must often be made in the heat of trial. A vigorous and independent mind is needed to perform such delicate tasks. It would be unfair to require a judge to exercise his independent judgment and then to punish him for having exercised it in a manner which, in retrospect, was erroneous.[55]

II. The Judicial Act Requirement

The *Stump* Court also held that the doctrine of judicial immunity will not apply unless the judge's conduct constitutes a judicial act.[56] The judicial act requirement also dates back to *Bradley*.[57] The plaintiff in *Stump* argued that the judge had not performed a judicial act because the petition had not been given a docket number, had not been placed on file, and had been approved in an ex parte proceeding without first giving notice, appointing counsel for the minor, or holding a hearing.[58]

The argument that the lack of formality and the presence of procedural irregularities would destroy the judicial character of a judge's action was rejected.[59] The Supreme Court established a test

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[53]46 U.S.L.W. at 4255 (quoting Bradley v. Fisher, 80 U.S. (13 Wall.) at 347).

[54]38 U.S. 547 (1967).

[55]*Id.* at 566 (Douglas, J., dissenting).

[56]46 U.S.L.W. at 4256.

[57]As pointed out by the dissent in *Stump*, the proposition that immunity only applies to the performance of judicial acts was emphasized seven times by the *Bradley* Court. *Id.* at 4257 n.2 (Stewart, J., dissenting) (citing Bradley v. Fisher, 80 U.S. (13 Wall.) at 347, 348, 349, 351, 354, 357).

[58]46 U.S.L.W. at 4256.

[59]In so concluding, the Court cited McAlester v. Brown, 469 F.2d 1280 (5th Cir. 1972), *cited in* Stump v. Sparkman, 46 U.S.L.W. at 4256. In *McAlester*, the judge's alleged misconduct involved an improper arrest ordered outside of the courtroom and at a time when the judge was not wearing his robes. Nevertheless, the reviewing

for determining when a judge's conduct should be classified as a judicial act for purposes of judicial immunity. The first factor to be considered is whether the party dealt with the judge in a judicial capacity.[60] This inquiry is made subjectively, based upon the parties' expectations. In applying this part of the test to the facts in *Stump*, the Court found that the petition had been presented to Judge Stump only because of his position as circuit court judge.[61] That is, the minor's parent realized she was dealing with the judge in his judicial role. *Lynch v. Johnson*,[62] cited with approval by the Court, demonstrated the point at which a judge is no longer acting in his judicial capacity. The judge in *Lynch* was not permitted the defense of judicial immunity for actions arising out of his service pursuant to state statute, as the presiding officer of the county "Fiscal Court."[63] Since the "Fiscal Court" was merely a board of county commissioners who performed only administrative or legislative functions, the court held the judge had not performed any judicial acts.[64] Arguably, since the events did not transpire in a judicial forum, the parties did not feel they were dealing with the judge in his official capacity.[65]

The second factor relevant to the judicial act determination is whether the act is a "function normally performed by a judge."[66] The Court did not contend that normal judicial functions include approval of petitions for sterilization but reasoned that consideration of a petition relating to the affairs of a minor is the type of action a judge is normally called upon to review in his official capacity.[67] One should note that it is not the particular subject matter of the petition but the act of entertaining and acting upon petitions of a general type that is the critical consideration. *Gregory v. Thompson*[68] was cited as an example of a judge who did not perform a judicial act. In *Gregory*, a judge had been sued for assaulting a man while physically removing him from the courtroom. The reviewing court concluded that the judge had not performed a judicial act, but

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court held that the judge was acting in his judicial capacity and was entitled to judicial immunity. 469 F.2d at 1282.

[60]46 U.S.L.W. at 4256.

[61]*Id.* at 4257.

[62]420 F.2d 818 (6th Cir. 1970), *cited in* Stump v. Sparkman, 46 U.S.L.W. at 4256.

[63]420 F.2d at 820.

[64]*Id.*

[65]The example posed by the *Lynch* court is useful. "A judge does not cease to be a judge when he undertakes to chair a PTA meeting, but, of course, he does not bring judicial immunity to that forum either." *Id.*

[66]46 U.S.L.W. at 4256.

[67]*Id.* at 4257.

[68]500 F.2d 59 (9th Cir. 1974), *cited in* Stump v. Sparkman, 46 U.S.L.W. at 4256.

rather that the judge had discharged a function normally performed by a sheriff or bailiff.[69]

The dissenting opinions in *Stump* contended that the judge's conduct should not have been classified as a judicial act. Justice Powell argued that a judicial act is one that does not preclude a party's right to resort to appellate or other judicial remedies.[70] Because the judge's "unjudicial" conduct prevented the minor from protecting her rights through the appeal process, the dissent asserted that the judge should not have been entitled to immunity.[71] Support for this characterization of a judicial act can be found in *Gregory* where the court stated: "A judicial act within the meaning of the doctrine may normally be corrected on appeal."[72]

The characteristics of a judicial act considered by the Supreme Court are conduct of a type normally performed by a judge and conduct performed in an official judicial capacity. The Court did not mention the exercise of discretion. The Court also did not mention the exercise of judgment—a characteristic with considerable support in case law.[73] In 1843, it was stated: "Some of the . . . [acts] of a justice are judicial, and some ministerial; and when he acts ministerially, . . . for error and misconduct he is responsible in like manner . . . as all other ministerial officers."[74] The distinction between a ministerial act and a judicial act is that the former is precisely prescribed by law and allows no discretion while the latter requires the exercise of judgment or decision-making.[75]

Perkins v. United States Fidelity & Guaranty Co.[76] shows how the exercise of decision-making applies to the judicial act requirement. In *Perkins*, the complaint alleged that a probate court judge had wrongfully committed the plaintiff to a mental institution. In an effort to circumvent the immunity doctrine, the plaintiff argued that the judge's action in effecting the commitment had merely been a ministerial act. The Fifth Circuit Court of Appeals, after restating

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[69]500 F.2d at 64-65. Since the judge was deemed to have acted as a sheriff, he was permitted to claim a qualified immunity. Such immunity only extends to acts committed in good faith. Pierson v. Ray, 386 U.S. 547 (1967).

[70]46 U.S.L.W. at 4259 (Powell, J., dissenting).

[71]*Id.*

[72]500 F.2d at 64.

[73]*Ex parte* Virginia, 100 U.S. 339 (1879); Perkins v. United States Fidelity & Guar. Co., 433 F.2d 1303 (5th Cir. 1970); Doe v. County of Lake, Ind., 399 F. Supp. 553 (N.D. Ind. 1975); Bramlett v. Peterson, 307 F. Supp. 1311 (M.D. Fla. 1969); Stone v. Graves, 8 Mo. 148 (1843); Yates v. Lansing, 5 Johns. 282 (N.Y. 1810).

[74]Stone v. Graves, 8 Mo. 148, 151 (1843).

[75]Dear v. Locke, 128 Ill. App. 2d 356, 262 N.E.2d 27 (1970); Sweeney v. Young, 82 N.H. 159, 131 A. 155 (1925); State v. Nagel, 185 Or. 486, 202 P.2d 640, *cert. denied*, 338 U.S. 818 (1949).

[76]433 F.2d 1303 (5th Cir. 1970).

the rule that a judicial act is one that results from the exercise of discretion, rejected the plaintiff's argument:

> We doubt the existence of many situations calling for more judicial discretion and decision-making talent than in the determination of the competency of a human being. The task calls for the court to look into the mind of an individual and determine his mental state under rules which are vague, difficult to apply, and necessarily imperfect.[77]

Acts which have been held to be ministerial and thus beyond the scope of judicial immunity are acts related to the selection of jurors,[78] judicial control over the processing and treatment of detained juveniles,[79] and failure to inform indigent defendants of their right to court-appointed counsel.[80]

The primary reason given for the existence of the judicial immunity doctrine is to preserve the integrity and independence of the judicial decision-making function.[81] Since the ministerial/judicial distinction attempts to separate acts that involve the exercise of judgment from those that allow the judge no discretion, it serves to bring the scope of protection into closer harmony with its purpose. If immunity were extended to include the misperformance of a ministerial act, then the purpose would be only to protect the judge and not the decision-making process of the judiciary. It is doubtful, therefore, that the mere omission of this element from the *Stump* opinion indicates disapproval.

Finally, the Supreme Court held that immunity applies with equal force to suits in which a judge is alleged to have acted with malice or from corrupt motives.[82] This principle was firmly established by *Bradley v. Fisher*[83] and has been uniformly followed in the

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[77]*Id.* at 1305.

[78]*Ex parte* Virginia, 100 U.S. 339 (1879) (judicial immunity not a defense in criminal action where judge given no discretion by statute).

[79]Doe v. County of Lake, Ind., 399 F. Supp. 553 (N.D. Ind. 1975) (suit seeking only equitable relief).

[80]Bramlett v. Peterson, 307 F. Supp. 1311 (M.D. Fla. 1969) (suit seeking only equitable relief).

[81]Pierson v. Ray, 386 U.S. 547, 554 (1967); Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 348 (1872); Gregory v. Thompson, 500 F.2d at 63; Shore v. Howard, 414 F. Supp. 379, 385 (N.D. Tex. 1976); Doe v. County of Lake, Ind., 399 F. Supp. 553, 555 (N.D. Ind. 1975). *See* Jennings, *Tort Liability of Administrative Officers*, 32 MINN. L. REV. 263, 270-72 (1937).

[82]46 U.S.L.W. at 4255 (quoting Bradley v. Fisher, 80 U.S. (13 Wall.) at 351).

[83]80 U.S. (13 Wall.) at 335, 351. In Randall v. Brigham, 74 U.S. (7 Wall.) 523 (1868), the Court stated that a judge might be held liable if his acts were done maliciously. 74 U.S. (7 Wall.) at 536. The *Bradley* Court characterized this statement as dictum and concluded that malice did not affect the scope of immunity. 80 U.S. (13 Wall.) at 351.

case law.[84] The policy justification for immunizing malicious conduct is to free judges from harassing, expensive, and time consuming law suits.[85] Since there will be no issue involving the judge's state of mind, the suit will be highly susceptible to dismissal at an early stage in the litigation.

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[84]Imbler v. Pachtman, 424 U.S. 409 (1976); Pierson v. Ray, 386 U.S. 547 (1967); Wiggins v. Hess, 531 F.2d 920 (8th Cir. 1976); Duba v. McIntyre, 501 F.2d 590 (8th Cir. 1974), *cert. denied*, 424 U.S. 975 (1976); Gregory v. Thompson, 500 F.2d 59 (9th Cir. 1974); Cadena v. Perasso, 498 F.2d 383 (9th Cir. 1974); Skolnick v. Campbell, 398 F.2d 23 (7th Cir. 1968); Meredith v. Van Oosterhout, 286 F.2d 216 (8th Cir. 1960), *cert. denied*, 365 U.S. 835 (1961); Harris v. Harvey, 419 F. Supp. 30 (E.D. Wis. 1976); Weaver v. Haworth, 410 F. Supp. 1032 (E.D. Okla. 1975); Bottos v. Beamer, 399 F. Supp. 999 (N.D. Ind. 1973); McGlasker v. Calton, 397 F. Supp. 525 (M.D. Ala.), *aff'd*, 524 F.2d 1230 (5th Cir. 1975); Garfield v. Palmieri, 193 F. Supp. 137 (S.D.N.Y. 1961), *aff'd*, 297 F.2d 526 (2d Cir.), *cert. denied*, 369 U.S. 871 (1962).

[85]Pierson v. Ray, 386 U.S. 547, 554 (1967); Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 348 (1872); McCray v. Maryland, 456 F.2d 1, 3 (4th Cir. 1972); Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949).

Book Review

PRIVATE PROPERTY AND THE CONSTITUTION. By Bruce A. Ackerman.*

New Haven and London: Yale University Press. 1977.
Pp. ix, 303. $12.95.

*Reviewed by James W. Torke***

To that great majority of the bar still travelling conventional, time-honored (or timeworn) paths of analysis and argument—statutory text, cases, history—Professor Ackerman's essay on the just-compensation clause of the fifth amendment may seem irrelevant, even impertinent; at best, addressed to legal philosophers rather than to lawyers and judges daily facing hard, real puzzles about "takings" and damages. Indeed, Ackerman does reject those conventional paths as beginning and ending in mystery.[1] Yet, it is the practicing bar and bench, those who finally must resolve just-compensation disputes, to whom he beckons most emphatically.

Ackerman begins with the proposition that our increasing concern with the environment, a concern manifested more and more frequently in governmental regulation, means that we can be "assure[d] that the compensation clause will return to center stage" of constitutional controversy.[2] Unfortunately, the present shape of "compensation law—after a long period of neglect"—is not adequate to the task ahead and "is in need of a fundamental reconsideration."[3]

The central problem in compensation cases, of course, is to determine when those called upon to sacrifice property interests for the public good may "justly demand that the state compensate them for the financial sacrifice they are called upon to make."[4] Insofar as present compensation law has lost touch with that fundamental question—that is, has become a bundle of rules, internally consistent, but otherwise afloat—a new beginning is needed. To the question, "Where do we begin?" Ackerman invites all of us, lawyers and scholars, to accept the premise that "law must become philosophical if it is to make sense of the demand for just compensation."[5]

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[1]B. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION 5-9 (1977).

[2]*Id.* at 3.

[3]*Id.*

[4]*Id.* at 1.

[5]*Id.* at 189.

Now, if the law is to become philosophical, then "analysts must become philosophers if they wish to remain lawyers."[6] This is so because "philosophy decides cases; and hard philosophy at that."[7] Demonstration of this last assertion is, in fact, the major task of this book. That is, the author is setting out to "illuminate the relationship between general philosophical perspective and particular legal doctrine"[8]; though he is not trying to teach philosophy.[9] The claim that such a relationship exists is not, I suppose, very new; it may even be regarded as a truism. Yet as truths become truisms, they need enlivening by demonstration; and it is in this undertaking that the book gains importance. This task, however, is complicated by the special characteristics of his audience:

> The American lawyer continues to be surrounded by institutions and symbols that teach him to be skeptical of abstract and systematic thought, encouraging him instead to view himself as a hard-headed problem-solver who reacts to each practical situation in the light of his common-sense understanding of social expectations.[10]

This is doubtlessly true. What is more, this attitude has popularly been respected as a virtue, not only of American lawyers, but of Americans generally, being manifested at times in a mistrust of lawyers themselves.[11] Yet, I think Ackerman underestimates the conscious purpose underlying this skepticism and forgets that there is more beneath its surface than ignorance or sleepiness.[12]

In a sense, he admits as much when he characterizes present compensation law "as the work of a corps of Ordinary Observers who understood their judicial function in a rather *restrained* fashion."[13] As will be seen, the Ordinary Observer is one with a definite and, I assume, consciously chosen approach to legal problems. Nevertheless, he charges that the muddled state of modern compensation law is in part due to a failure to bear in mind its distinctive nature and the suppositions underpinning its early

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[6]*Id.* at 5.

[7]*Id.*

[8]*Id.* at 84. *See also id.* at 72, 221 n.7.

[9]*Id.* at 84.

[10]*Id.* at 187.

[11]*See, e.g.*, L. FRIEDMAN, A HISTORY OF AMERICAN LAW 81-88 (1973).

[12]Daniel Boorstin, in *The Americans: The National Experience*, records a noteworthy episode in which Jeremy Bentham offered his services to President Madison and various state governors. His proposal to construct a complete code for the country was rebuffed, in part, because it did not seem fitting for the American legal genius. D. BOORSTIN, THE AMERICANS: THE NATIONAL EXPERIENCE 36 (1965).

[13]B. ACKERMAN, *supra* note 1, at 109 (emphasis in original).

development, which are the guiding precepts of the Ordinary Observer.[14] That the great number of persons engaged in any endeavor are unaware of the fact that they follow a tradition representing only one of several possible attitudes is commonplace and is as true among lawyers as among any other group. But this phenomenon does not necessarily lead the overall endeavor into a muddle, though some participants may always end up there. Present compensation law is not muddled simply because it has not yet accounted for new problems. After all, its basic premises may be said to resist providing solutions until the dispute is kindled and in court.[15]

On the other hand, if one rejects those premises and substitutes others, as does a Scientific Policymaker,[16] there may appear an incongruence properly labelled a muddle. In Ackerman's terms, the Scientific Policymaker will, for that very reason, find compensation law to be muddled.[17] Although in his last chapter Ackerman disclaims that he is writing a brief for either the Ordinary Observer or the Scientific Policymaker, I think his personal orientation toward the latter type pervades the essay. When he calls the present state of the law sorry and identifies it as the handiwork of Ordinary Observers, he is, at the least, suggesting that such an approach is no longer adequate to the pace and complexity of the times. He may be right, but as these two character types unfold, it may appear that he is but expressing a preference of a sort that has been present throughout history, has in some places and times become predominant, and is often favored by those with a scholarly bent.

What then are the distinctive traits of the Ordinary Observer and the Scientific Policymaker?[18] After defining these types, we will want to know whether choice of one or the other approach will affect the outcome of cases.[19] Despite Ackerman's preference noted above, formally speaking, he leaves the last task of choosing the best model or blend thereof to the reader.[20]

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[14]For a definition of the Ordinary Observer, *see id.* at 15.

[15]Again, Boorstin comments: "[T]his common-law approach to experience was to become a whole philosophy, or rather an American substitute for a philosophy. Its name was pragmatism. . . . There is some reason to suspect that the pragmatic philosophy itself began simply as a way of generalizing this common-law approach." D. BOORSTIN, *supra* note 12, at 42.

[16]For a definition of the Scientific Policymaker, *see* B. ACKERMAN, *supra* note 1, at 15.

[17]*Id.* at 168.

[18]However, we are all, if only unconsciously, a bit of both types. *Id.* at 110-11.

[19]*Id.* at 21.

[20]*Id.* at 103.

The Ordinary Observer and the Scientific Policymaker are distinguishable at two points: Language and principle. For the Ordinary Observer, the language of law cannot be understood apart from its ordinary and common meaning: "[L]egal language cannot be understood unless its roots in the ordinary talk of non-lawyers are constantly kept in mind."[21] By contrast, the Scientist defines legal language as a set of precisely related and clearly defined technical concepts independent of ordinary talk; in fact, an appeal to such "ordinary talk of non-lawyers" is the "surest sign of muddle."[22] To illustrate this difference, Ackerman describes an example of "ordinary property talk." A child growing up in America gradually learns that some things are his and that some are not. He owns the former and can do with them what he likes, subject only to the limit that he cannot use them in a manner unduly harmful to others. Those things he does not "own" can be used only with the owner's permission, except in emergencies.[23] The Scientist, however, "rebels at the thought that a single person can be properly identified as *the* owner of a thing."[24] Rather, "Scientific property talk" is concerned with

> the relationships that arise *between people* with respect to things. . . .
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> Indeed, so far as the Scientist is concerned it would be much better (but for the inconvenience involved in abandoning shorthand) to purge the legal language of all attempts to identify any particular person as "the" owner of a piece of property.[25]

The second fundamental difference turns on the source of principle to which the resolution of a particular dispute is to conform. Policymakers

> understand the legal system to contain, in addition to rules, a relatively small number of general principles describing the abstract ideals which the legal system is understood to further. It is this statement of principle, presumed by the Policymaker to form a self-consistent whole, which [this discussion will] call a Comprehensive View.[26]

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[21] *Id.* at 10.

[22] *Id.* at 10-11. The classic example of Scientific language, thus defined, are the writings of Wesley Hohfeld. *Id.* at 11, 194 n.15 (citing W. HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS (1919)).

[23] B. ACKERMAN, *supra* note 1, at 97-100.

[24] *Id.* at 99 (emphasis in original).

[25] *Id.* at 26-27 (emphasis in original).

[26] *Id.* at 11 (footnotes omitted).

And it is this Comprehensive View that provides the Policymaker's standards for evaluation of legal rules. Of course, the solution to a particular problem depends upon the particular Comprehensive View chosen. But whether it be Kantian[27] or Utilitarian,[28] the direction of appeal to authority is the same.

Observers, on the other hand, test a legal rule by measuring the extent to which it

> vindicates the practices and expectations imbedded in, and generated by, dominant social institutions. . . . Rather than grounding his decision in a Comprehensive View stating the ideals the legal system is understood to serve, the Observer will instead seek to identify the norms that in fact govern proper conduct within the existing structure of social institutions. Having articulated the existing pattern of socially based expectations as sensitively as he can, the Observer will then select the legal rule which, in his best judgment, best supports these institutionally based norms.[29]

Edmund Burke[30] and Justice Holmes fit the pattern of the Observer.[31]

The difficulty a reader may have in envisioning the types in action is mitigated to a substantial extent by the devotion of the major portion of the book to demonstrating the consequences, in the context of just-compensation cases, of selecting one or the other approach. But before proceeding to this demonstration, Ackerman introduces another set of variables: The judge's perception of his role as judge. A judge may be either restrained or innovative. The totally restrained judge makes certain assumptions, the major of which is that the dispute brought before him must be treated *as if* it had

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[27]*See id.* at 71-87. Professor Ackerman explains that his use of the term "Kantian" is somewhat specialized. By it, he is describing a recent trend among political theorists —*i.e.*, Rawls, Nozick, Dworkin—that is roughly anti-utilitarian, and harmonic at least insofar as it agrees that the central flaw of utilitarianism is, in Dworkin's phrase, its failure to "take rights seriously." *Id.* at 83, 227 n.30.

[28]*See id.* at 43-70.

[29]*Id.* at 12. The author anticipates the contention that his terms may produce another pair: The Scientific Observer, and the Ordinary Policymaker. He explains that he need not take them into account because the Scientific Observer is likely only to succeed in telling the Ordinary Analyst what he already knows. As for the Ordinary Policymaker, his basic assumption, that social practices are organized around a Comprehensive View, is empirically false. Ackerman does not, however, deny the existence, then and now, of these types. *Id.* at 17-20.

[30]*See, e.g.*, E. BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE (1790), for a representative work of this eighteenth century political thinker.

[31]B. ACKERMAN, *supra* note 1, at 179. *See also* sources discussing Holmes in *id.* at 282 n.40.

been generated by a set of perfectly functioning institutions.[32] The innovative judge, however, takes into account as part of his calculus that the world falls far short of perfection. He will thus use his office to improve the existing state of the law.[33] For example, the totally restrained Policymaking judge assumes that property rights are distributed consistently with the operative Comprehensive View, and that the organs of government as well as private citizens conform in their actions and faiths to that Comprehensive View. He is thus conservative regarding the state of the law, deferential to nonjudicial organs, and principled because he trusts that litigants and other concerned citizens accept the Comprehensive View to which the decision conforms. His innovative brethren, by comparison, are respectively reformist (believing that the law is not right), not deferential, and pragmatic where adherence to principle seems to produce results unacceptable to significant interests in the system.[34]

This analysis of types seems to me a helpful contribution to the description of judicial behavior, particularly as it identifies varieties of restraint and innovation which can coexist in a single judge who thereby resists typing as simply restrained or simply innovative as the case may be. A full-scale development of these characteristics would in itself be a worthwhile offering to legal scholarship, but Ackerman is chasing another theme to which we must now return: The consequences of being an Ordinary Observer or a Scientific Policymaker, whether restrained or innovative.

That the choice makes a difference is, of course, critical to Ackerman's whole enterprise; and so he properly devotes the major portion of the text to demonstrating the difference. The reader will have to decide for himself whether he makes his case, though I found the argument persuasive. An illustration may give a sense of the whole.

Consider the case of the owner of two Cadillac automobiles, each worth $5,000. In response to the world energy crisis, suppose the government considers two measures: (a) Setting the maximum speed limit at twenty-five miles per hour (alternative A), or (b) leaving the speed limit intact but taking possession of one-half of the nation's automobiles (alternative B). Assume further that under alternative A the value of each car will depreciate by $2,000, leaving our owner

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[32] *Id.* at 34.

[33] *Id.* at 36.

[34] *Id.* at 34-39. Of course, a given judge's assumptions may vary so that while he may assume a perfectly functioning set of institutions, he will not always assume citizens will suffer an adverse decision without a grievous sense of loss. Thus, while conservative and even deferential, he may not always be principled, but rather pragmatic. We thereby have eight possible varieties of judges. *Id.* at 39, 204 n.8.

$4,000 poorer. Under alternative B, the loss is the same because, though one car is lost, the decrease in cars causes his remaining Cadillac to increase in value from $5,000 to $6,000. Yet, though the economic loss is the same, present compensation law, which, we must recall, is largely the product "of a corps of Ordinary Observers who understood their judicial function in a rather *restrained* fashion,"[35] will regard alternative B as a "taking" that will likely call for compensation, while under alternative A our Cadillac owner will be left to suffer the loss as best he can. Such an apparent disparity accords with the ordinary understanding of what constitutes a compensable "taking" of property and what constitutes only a regulation,[36] and hence is but slightly, if at all, disturbing to those who talk "ordinary property talk" (which is the great majority of people).

The Scientific Policymaker, however, balks at this seemingly oversimplified view. For example, the Utilitarian Scientific Policymaker, at least one of the restrained variety, given the redistribution of property rights that has occurred, will consider the Appeal to General Uncertainty:[37] that is, that increased economic uncertainty may cause particularly risk-averse individuals to adapt their behavior to less risky forms of wealth or at least to insure against a new risk. This uncertainty cost must be compared to the process cost: that is, to the cost of eliminating the uncertainty by providing a compensation system. There is also to be considered the possibility and cost of citizen disaffection. If uncertainty and disaffection costs exceed process costs, then the Utilitarian Scientific Policymaker will award compensation.[38]

The Kantian Scientific Policymaker perceives other problems. The principle that no individual should be used merely as a means to satisfy another's ends requires a comparison of the net benefit generated by the redistribution and the process cost of a compensation system. If the latter are less than the former, compensation may be forthcoming.[39]

Even assuming that each of our types would demand compensation under alternative B, calling for the seizure of automobiles by the government, differences would exist in determining the proper measure of compensation: the Policymaker being apt to award the

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[35] *Id.* at 109 (emphasis in original).

[36] *Id.* at 124-29. We are talking only of the establishment of a prima facie case of "taking." It is still to be decided whether the taking was necessary to prevent recognizable anti-social conduct, in which case compensation might be denied, even under alternative B. *See, e.g., id.* at 126, 243 n.30. *See also* text accompanying note 18 *supra.*

[37] B. ACKERMAN, *supra* note 1, at 44.

[38] *Id.* at 48.

[39] *Id.* at 72-73.

net loss of $4,000; the Observer, the $5,000 value of the lost Cadillac.[40]

So far as this and many other examples demonstrate that what is a "sensible" solution depends on the choice of the source of "sense," we see the reality underlying the tension which Ackerman perceives as coloring the present state of legal thought. While most of present compensation law is the product of Ordinary Observers,[41] —though the "deeper structures" of precedent have been "lost from view"[42]—Ackerman finds that an increasing number of sophisticated lawyers and judges are thinking and writing about law, consciously or not, as Scientific Policymakers.[43] Scientific Policymaking, he contends, has been particularly triumphant in the law schools—a phenomenon bound to radiate increasing influence as new generations of lawyers so schooled rise to positions of prominence in the profession. Thus, Ackerman argues, we are not confronting "some theological dispute between rival Popes temporarily quartered at Oxford, Chicago, and Yale."[44] If that were the case,

> it would be of no practical importance to lawyers. Yet if, as I suspect, the conflict between Scientific Policymaker and Ordinary Observer is emerging as one of the master issues in the professional practice of law, lawyers cannot afford to view these academic exercises in mutual incomprehension with casual disdain or idle curiosity.[45]

The author's quest to "establish a relationship between philosophy and constitutional law"[46] seems to me successful. As well, his analysis of the tension in American legal thought, a tension to some extent exemplified by the cold war between the bar and the academy, is also insightful. The lines, however, are not drawn neatly. I wonder whether his assessment of the clear predominance of the Scientific Policymaker in the law schools is not confined somewhat to the type of "Papal residence" he refers to, though this predominance may well emerge in the majority of law schools in the future. Elsewhere, the tension is being manifested in a type of skirmish of which he takes little note: The growing demand from the bench and bar for graduates with "lawyering skills." The burgeoning of clinical programs represents, in part, the schools' concessions

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[40] *Id.* at 127.

[41] *See* text accompanying note 35 *supra*. *See also* B. ACKERMAN, *supra* note 1, at 168.

[42] B. ACKERMAN, *supra* note 1, at 168.

[43] *Id.*

[44] *Id.* at 175.

[45] *Id.*

[46] *Id.* at 72, 273 n.7.

to this demand—a demand which translates, in Ackerman's terms, into a young lawyer "skeptical of systematic thought," who is a "hard-headed problem-solver," and who depends upon "his common-sense understanding of social expectations"[47] to solve problems. Of course, lawyering skills are not inherently incompatible with an appreciation of the importance of philosophy in law, or of Scientific Policymaking as I understand it. Nevertheless, it seems that champions of such programs are not infrequently apt to be impatient with the systematic, more profound, or "theoretical" concerns of law. Technicians seem more in demand than social engineers. And it is not uncommon, even in the schools, to hear that the future of legal education lies in the teaching of practice skills. So far as "Oxford, Chicago, and Yale" and other centers of intellectual power are set on a different course, we might anticipate an increasingly deeper running division in the bar between the technician and the planner, the latter group, as it gravitates to centers of political power, taking on the characteristics of an elite.

Professor Ackerman makes a stout effort to keep his essay from becoming a broadside in favor of Scientific Policymaking.[48] His formal concern is with the possibilities and ramifications of fundamentally different modes of legal thought, though I think his preference for the Policymaker shows through. Nevertheless, he provides a language technique which clarifies a tension which many lawyers have sensed, but only dimly understood. He displays possibilities, not goals. While in a time of uncertainty and faithlessness the logic and comprehensiveness of philosophical systems may seem almost irresistible, the nation's very diversity—a diversity reflected in its law schools—may nourish sufficiently the bedrock skepticism which has made American legal thought so characteristically modest and so committed, if unconsciously, to the vantage of the Ordinary Observer. Whatever the future, this book serves an essential purpose of illuminating available directions, and at its most practical level, it is a valuable appraisal of just-compensation law.

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[47]*Id.* at 187. This is not, of course, a new phenomenon. *See, e.g.*, D. BOORSTIN, *supra* note 12, at 44 (a bibliographic note commenting on the American law schools' "myopic preoccupation with what is in current demand by practitioners").

[48]*See, e.g.*, B. ACKERMAN, *supra* note 1, at 176-84.